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No. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

VILLAGE OF PENN YAN, NEW YORK, and
MUNICIPAL ELECTRIC UTILITIES ASSOCIATION OF
NEW YORK STATE,

Petitioners,

v.

NEW YORK STATE ELECTRIC & GAS CORPORATION, and
FEDERAL ENERGY REGULATORY COMMISSION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission is empowered under §§ 205 and 206 of the Federal Power Act, without holding an evidentiary hearing, to invalidate territorial restrictions, found by the Commission on the pleadings to be anticompetitive, unjust and unreasonable, contained in contracts under the Commission's jurisdiction for the transmission of electrical energy, without calling upon the additional authority recently granted the Commission by §§ 211 and 212 of the Act.

PARTIES BELOW

New York State Electric & Gas Corporation (NYSEG) was petitioner below to review orders of the Federal Energy Regulatory Commission (FERC or Commission). FE"C was respondent below. The Village of Penn Yan, New York (Penn Yan) and the Municipal Electric Utilities Association of New York State (MEUA)* were intervenors below to support the orders of FERC. FERC is joined as respondent here pursuant to Sup. Ct. R. 19.6 (1980).

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* MEUA is an association of 46 New York municipal electric utilities and four cooperative electric utilities. Among the municipal members are the Villages of Penn Yan, Bath, Castile, Endicott, Greene, Groton, Marathon, Silver Springs and Watkins Glen. Among the Associate members is the Steuben County Electric Cooperative in which the former Chautauqua-Cattaraugus and Steuben Rural Electric Cooperatives, Inc., are now merged. *See* p. 3, below.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in its Docket No. 79-4185, affirming in part and vacating in part orders of FERC.

OPINIONS BELOW

The opinion of the court of appeals, reported at 638 F.2d 388, is appendix B hereto. The order of the court denying rehearing is appendix C. The declaratory order

of FERC, reported at 17 F.P.S. 5-414, is appendix D, and FERC's order denying rehearing, not reported, is appendix E.

JURISDICTION

The judgment of the court of appeals was entered on September 30, 1980. Timely petitions for rehearing were denied on February 19, 1981, and this petition was filed within 90 days thereafter. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are §§ 205(a)-(c), 206(a), 211 and 212 of the Federal Power Act, 16 U.S.C. §§ 824d(a)-(c), 824e(a), 824j and 824k. They are set out in appendix A hereto.

STATEMENT OF THE CASE

The Village of Penn Yan and many of the other municipal and cooperative electric utilities associated under MEUA purchase power for resale to their customers from the Power Authority of the State of New York (PASNY) pursuant to the Niagara Power Project Act, 16 U.S.C. §§ 836 and 836a. As public bodies and non-profit cooperatives, they are entitled to the preference accorded by § 836(b)(1). The Act requires PASNY to make arrangements for transmission of project power to such preference customers. § 836(b)(4); *see* N.Y. Pub. Auth. Law §§ 1005.5 and 1005.7 (McKinney Supp. 1980).

On February 10, 1961, PASNY entered into a contract, designated NS-11, with NYSEG whereby NYSEG agreed to transmit and deliver PASNY power to Penn

Yan and other municipal and cooperative electric utilities. Article X ¶ 3 of this contract provides:

> The electric power and energy to be delivered by Contractor to Authority for customers from the system of Contractor will be limited to such electric power and energy as is necessary for the use, distribution and resale within the area limits served as of the date hereof by the Villages of Bath, Castile, Endicott, Greene, Groton, Marathon, Penn Yan, Silver Springs and Watkins Glen, Chautauqua-Cattaraugus Electric Cooperative, Inc. and Steuben Rural Electric Cooperative, Inc., and for such other loads and customers of Authority as may be mutually agreed upon from time to time.

Overall, the obligation of NYSEG to wheel PASNY power to Penn Yan and others is limited to NYSEG's transmission capacity in excess of its own needs. Article IX ¶ 1 of the contract provides:

> Contractor shall make such delivery at such points as Authority may from time to time designate on the system of contractor upon the conditions hereafter provided to the extent that contractor has available transmission capacity in its system therefore.

Paragraph 3 of the same article requires PASNY annually to submit estimates of its customers' transmission requirements for the next five years and provides that: "Contractor shall inform Authority in writing whether or not it will be able to deliver the power and energy to meet each load included in such estimate. . . ."

On August 1, 1962, NYSEG entered into a contract with Penn Yan, paragraph 3 of which provides:

> The Customer and the Village [collectively, Penn Yan] may contract with the Authority [PASNY] for the supply of Customer's electrical energy re-

> quirements. Customer will take from the Authority under such contract only such electric energy required by the Village within the territorial limits, as of February 10, 1961, of the Village and its franchise area outside the Village as approved by the Public Service Commission of the State of New York, (a) for its own use, and (b) for distribution and resale to its existing and future customers. Electric energy purchased by the Customer from the Authority and delivered to the Customer by the Corporation pursuant to its agreement with the Authority shall be delivered at 34,500 volts at a point in the Village on the Corporation's 34,500 volt circuit at the Corporation's presently existing substation, known as the St. John's Substation. . . .

In 1967, Penn Yan, with the consent of the Town of Milo, annexed a small area, known as Excell Estates, now comprising about 30 houses, which previously had been within the limits of the Town of Milo. New York law authorizes a village that owns and operates a municipal electric utility to serve an annexed area unless it has agreed to the contrary with the town or village from whose jurisdiction the area was acquired. N.Y. Gen. Mun. Law § 360, *et seq.* and § 707.1 (McKinney 1974); N.Y. Village Law § 12-1204 (McKinney 1973). No such restrictive agreement was entered into between Penn Yan and Milo.

Beginning in 1970, the residents of the annexed area variously petitioned NYSEG, PASNY, Penn Yan and the New York Public Service Commission to receive electric service from Penn Yan rather than from NYSEG. Refusing the then current petition of the residents, NYSEG wrote on October 30, 1970:

> Paragraph 3 of that agreement [*supra*] was specifically designed to preserve the territorial integrity of the Company's franchise area as of February 10, 1961.

On March 4, 1978, rejecting a renewal of the petition after referring to its 1970 response, NYSEG wrote:

> Our Company position has not changed in this regard and we are not agreeable to any modification of the agreement between the Village and New York State Electric & Gas Corporation dated August 1, 1962.

Thereafter, Penn Yan commenced proceedings before FERC to invalidate the territorial restrictions contained in the contracts as illicitly anticompetitive, unjust and unreasonable under §§ 205 and 206 of the Federal Power Act. During the course of the proceedings, in which extensive presentations were made and documents submitted by Penn Yan, NYSEG and PASNY, it was discovered that NYSEG had never filed with FERC either its contract with PASNY, NS-11, or its contract with Penn Yan.

FERC found on the pleadings that NYSEG is an entity engaged in the interstate marketing of electrical energy, whose contracts for the transmission of power are within its jurisdiction under part II of the Federal Power Act. It further found that the territorial restrictions contained in the contracts, constituting horizontal restraints of trade, were invalid under its rule announced in *Gulf States Utilities Company*, Docket No. ER 76-816 (October 20, 1978). The Commission said (appendix D, pp. 6d-7d):

> . . . The two contractual provisions at issue restrict the *use* to which Penn Yan can put electric power wheeled to it by NYSEG from PASNY's Niagara Project. Under the previously cited provisions of both the NS-11 and the 1962 Agreement, Penn Yan's use of the wheeled power is limited to service of customers within its 1961 boundaries. However, there is no limitation in the *amount of*

power NYSEG will wheel.* For example, when Penn Yan's retail load increases due to an increase in population *within* its 1961 borders, NYSEG will be obligated to wheel additional power under the two contracts at issue. It is only when Penn Yan attempts to utilize wheeled PASNY power to serve outside those boundaries that the restriction comes into play. The effect of those provisions, then, is to protect NYSEG from competition for retail customers and to restrict Penn Yan's ability to extend its municipal system, thereby impairing and diminishing competition to serve retail customers in the extended territories.**

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* The only limitation on the *amount* of power Penn Yan can receive under this agreement is imposed by its contractual allocation from *PASNY* which is provided for in the PASNY-Penn Yan Niagara Contract NS-28. In its petition, Penn Yan indicates that it has not yet reached its full capacity allocation.

** Although it does not affect a large group of customers under the facts of this case, competition among utilities at the edges of their service territories does serve an important purpose. This form of competition can provide an incentive for the present holder of a distribution franchise to operate its system efficiently so as to keep costs low and continue to serve in the fringe areas.

The Commission ordered NYSEG to file with the Commission NYSEG's contract with PASNY, NS-11, its contract with Penn Yan, and its contracts with other utility customers similar to its contract with Penn Yan. Finding on the extensive pleadings and submissions that there was not only a want of credible suggestion of justification for such restrictions, but that there was showing that they had been included in the contracts precisely to stifle competition, the Commission declared the territorial restrictions in such contracts invalid and unenforceable.

After consideration, the Commission denied NYSEG's application for rehearing, and adhered to its declaratory order of March 28, 1979. Appendix E.

Thereafter, NYSEG made the filings as ordered under protest and Penn Yan began to provide retail electric service to the residents of Excell Estates, which it is continuing to do.

On NYSEG's petition to the Second Circuit to review the orders of the Commission, the court affirmed the Commission's holding that the contracts concerned are within the Commission's jurisdiction and are required to be filed with it. Deeming the Commission's declaration of the invalidity and unenforceability of the territorial restrictions in contract NS-11 to be tantamount to an order requiring wheeling, the court, one of the panel of three judges dissenting, vacated so much of the orders as modified this contract and remanded for hearing in accordance with §§ 211 and 212 of the Federal Power Act. Although the court held that FERC's invalidation of the territorial restriction in the 1962 contract between NYSEG and Penn Yan did not constitute an order compelling wheeling, it remanded this issue to FERC for a hearing pursuant to § 206.

On February 19, 1981, the court denied timely and allied petitions for rehearing by FERC, Penn Yan and MEUA, supported by the United States as amicus curiae.

REASONS FOR GRANTING THE WRIT

The decision below substantially impairs the authority of FERC under two of the most basic sections, 205 and 206, of the Federal Power Act. In this, it is at odds with decisions of this Court and other courts of ap-

peal and will have significant and recurring adverse impacts on the enforcement of these sections by FERC and on the public interests sought to be secured thereby.

Here, upon finding on undisputed facts established by extensive submissions that the territorial restrictions contained in NYSEG's transmission contracts with PASNY and Penn Yan were illegal as horizontal restraints on trade, the Commission held such restrictions invalid and unenforceable under § 206.

The court below, on the theory that the Commission's action might have the effect of increasing the amount of power NYSEG would be required to wheel to Penn Yan under NYSEG's transmission contract, NS-11, with PASNY, held that the Commission was without authority to invalidate the anticompetitive territorial restrictions in this contract, except by proceeding under §§ 211 and 212 of the Federal Power Act, recently added by the Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, §§ 203, 204, 92 Stat. 3117, 3136-39, (16 U.S.C. §§ 824j, 824k).

Respecting the anticompetitive restrictions in NYSEG's contract with Penn Yan, the court held that, though the Commission might be empowered to invalidate these under § 206, it should not have done so without holding an evidentiary hearing for the purpose of permitting NYSEG to attempt to justify such restrictions as serving the public interest.[1]

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[1] On the bases of the policy of the Commission announced in *Gulf States Utilities Company, supra*, that horizontal restraints are illegal *per se*, and of the unequivocal statement of NYSEG in the record that the territorial restriction in the Penn Yan contract "was specifically designed to preserve the territorial integrity of the Company's franchise area as of February 10, 1961," the court was wrong on this score as well. *See United States* v. *Florida East Coast*

I.

The regulation of transmission contracts is one of the primary powers and functions assigned by Congress to the Commission under §§ 205 and 206. In holding that the Commission, under the authority of these sections, may not modify or strike illegal provisions in or from such contracts, when the result might be to expand a utility's in-place obligation to wheel power, the decision quite simply emasculates these basic sections in relation to transmission contracts.

Section 205 stipulates that all contracts for the transmission of power entered into by interstate utilities shall be just and reasonable and filed with FERC. Section 206 empowers the Commission, upon finding that any such contract is unjust, unreasonable, unduly discriminatory or preferential, to fix it.

When it enacted part II of the Federal Power Act, Congress intended the Commission to have authority to expand wheeling obligations in connection with regulating the terms and conditions of wheeling contracts pursuant to §§ 205 and 206, even though it withheld

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Railway Co. 410 U.S. 224 (1973). An administrative agency should not be required to waste itself on litigation where the pleadings develop the salient facts and only issues of law need be resolved. *See, e.g., Citizens for Allegan County, Inc.*, v. *FPC*, 414 F.2d 1125, 1129 (D.C. Cir. 1969). The major issue warranting review by this Court is the proposition of the court below that, without proceeding under §§ 211 and 212, the Commission lacks authority under § 206 to invalidate anticompetitive restrictions in a transmission contract, where such action might result in increasing the wheeling obligation of the contractor. In the course of such review, the Court should also correct the holding of the court below that a hearing must be held where, as here, no material facts are in issue and a contract provision is both anticompetitive and within the ambit of the *per se* rule.

authority from the Commission to compel wheeling in the first instance. *See Public Utility Holding Companies: Hearings Before the House Committee on Interstate and Foreign Commerce*, 74th Cong., 1st Sess. at 395-96 (1935). And, when Congress was considering the bills that eventuated in new §§ 211 and 212 of the Act, it was informed that, where the basic obligation to wheel is in place, the Commission can regulate the obligation under §§ 205 and 206, even to order additional wheeling.[2]

Discussing the conference report on the legislation, Senator Metzenbaum, the floor manager, remarked the existence of present authority to effect wheeling and the intent of the draftsmen of the new legislation not to impair it. He said:

> It was not the intent of the conferees to modify in any way the rights of parties in presenting or prosecuting allegations of anticompetitive conduct before the Federal and State courts or before Administrative agencies, including the FERC and the Nuclear Regulatory Commission. Both have legal obligations to consider antitrust issues. Where any of these agencies presently have the authority to order transmission, coordination or other relief pursuant to a finding of anticompetitive conduct, undue discrimination or unjust and unreasonable rates, terms, conditions or the like, this authority would not be disturbed. The act does not limit the present authority of the agencies in this regard.

124 Cong. Rec. 17802 (daily ed. Oct. 9, 1978).

The suggestion implicit in the opinion below that enactment of §§ 211 and 212 diminished the authority of

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[2] *See* testimony of David Bardin, Deputy Administrator, FEA (and former Deputy General Counsel, FPC), *Hearings on Part E of S. 1469 Before the Subcomm. on Energy Conservation and Regulation of the Sen. Comm. on Energy and Natural Resources*, 95th Cong., 1st Sess., Part 3, 143 (1977).

the Commission over transmission contracts under §§ 205 and 206 flies in the face not only of regulatory and legislative history, but in that of the Act, as amended, as well. Section 212(e) provides:

> No provision of section 210 or 211 shall be treated —
>
> (1) as requiring any person to utilize the authority of such section 210 or 211 in lieu of any other authority of law, or
>
> (2) as limiting, impairing, or otherwise affecting any authority of the Commission under any other provision of law.

The decision below thus works a result precisely contrary to the expressed intent of Congress.

II.

The decision below emasculates Commission authority to review transmission contracts pursuant to §§ 205 and 206 of the Act, as Congress intended. At the same time, the decision precludes the Commission from complying with this Court's mandate that it consider competition and antitrust policy in exercising its jurisdiction.

Congress intended the Commission to have full regulatory authority over transmission contracts voluntarily entered into, and the Commission is mandated, in passing upon the justness, reasonableness and evenhandedness of the conduct and contracts of utilities within its jurisdiction, to consider competition and antitrust policy. *Gulf States Utilities Co.* v. *FPC*, 411 U.S. 747, 760-62 (1973); *see FPC* v. *Conway Corp.*, 426 U.S. 271, 279 (1976); *Central Power & Light Co.* v. *FERC*, 575 F.2d 937, 938 (D.C. Cir. 1978) (*per curiam*), *cert. denied*

sub nom. Dallas Power & Light Co. v. *Central Power & Light Co.*, 439 U.S. 981 (1979).

In their presentations in support of petitions for rehearing below, both the United States and the Commission stressed the damage the decision, while it stands, can be expected to do to the Commission's ability to secure the public interests safeguarded by §§ 205 and 206.

The Government expressed its interest as follows:

> The United States is participating in this case as *amicus curiae* because the Court's opinion raises serious questions regarding the ability of FERC to discharge its responsibility under the FPA to protect and enhance competition in the electric power industry. Competition in the sale of electric power at wholesale will be seriously limited if owners of high-voltage transmission systems will not enter into non-discriminatory transmission ("wheeling") contracts. FERC modification of jurisdictional wheeling contracts to eliminate anticompetitive provisions under Sections 205 and 206 of the FPA is an important method of protecting competition in the electric utility industry. The Court's opinion seriously impairs FERC's ability to satisfy its responsibilities under Sections 205 and 206.

The Commission,[3] by way of examples of cases before it tendering a range of issues, showed the court how the

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[3] The Commission's petition for rehearing below stated the issue and its importance as follows:

> The core issue in this case is whether the Commission has the statutory authority under Sections 205 and 206 of the Federal Power Act, 16 U.S.C. 824d and 824e, to modify unjust and unreasonable terms and conditions of transmission contracts where such modification expands or changes a pre-existing contractual commitment of a public utility to wheel (transmit) power. The panel held that the Commission has no such authority unless it first complies with Sections 211 and 212 of the Federal Power Act. Under the Court's view, Congress in-

decision will seriously impede and embarrass it in the discharge of its responsibilities under §§ 205 and 206.

The Commission called the court's attention to the fact that, in many situations where the Commission excises anticompetitive or other improper provisions from transmission contracts, a consequence of its action is to compel the contractor to wheel power in manner or amount different from that undertaken in the original contract. Compelling a utility that has agreed to furnish transmission services to provide them on just, reasonable, competitive and non-discriminatory terms is qualitatively different from compelling a utility, in the first instance, to provide such services.

If, contrary to the understanding of years, §§ 205 and 206 do not empower the Commission to do the former, what then is the purpose served by the express inclusion of transmission contracts among the subjects of these sections? Notwithstanding the pains to which Congress went in enacting §§ 211 and 212 to make clear that it intended no such result, the decision below goes a long way toward reading transmission contracts out of the coverage of §§ 205 and 206.

The Commission informed the court below that the decision casts doubt upon the Commission's authority

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tended these new provisions to define the sum total of all Commission power to direct or control wheeling.

It is our submission that this ruling is flawed in that it seriously misconstrues Congressional intent and overlooks established doctrine. Moreover, it should not be allowed to stand unamended since there is a real danger that it will severely hamper the Commission in carrying out its fundamental duty under Sections 205 and 206 to modify contractual provisions of transmission contracts, which the Commission finds are anticompetitive and not in the public interest. Because of the exceptional importance of the issues raised by the Court's decision, the Commission suggests rehearing in banc.

(Footnotes omitted).

under §§ 205 and 206, without recourse to §§ 211 and 212: (1) to investigate restrictions on assignability in agreements to share the use of transmission facilities which may unreasonably prevent the signatories to the agreement from using their interest in the facilities efficiently;[4] (2) to investigate the reasonableness of provisions in a utility's transmission agreement which give the utility "sole discretion" to refuse to transmit power, which determine the method of computing transmission losses, and which determine the appropriate power factor to be used in serving transmission customers;[5] (3) to investigate allegations that a utility's refusal to offer wheeling services to one member of a class of customers on the same terms and conditions as such services are offered to other similarly situated customers violates the prohibition on undue discrimination in §§ 205 and 206;[6] and (4) to investigate the terms and conditions of a variety of agreements to coordinate services among utilities, including transmission, challenged on the ground, among others, that they unreasonably prevent certain utilities from receiving the benefits of the services offered.[7]

In all of these situations, were the Commission to modify provisions of the transmission contracts found to be unjust, unreasonable, anticompetitive, illicitly discriminatory or preferential, it could be argued with

[4] As it is doing, *e.g.*, in *Pacific Gas & Electric Co.*, Docket No. E-7777 (Phase I).

[5] As it is doing, *e.g.*, in *Florida Power & Light Co.*, Docket No. ER 78-19, *et al.* (Phase II).

[6] As it is doing, *e.g.*, in *Town of Massena* v. *Niagara Mohawk Power Corp.*, Docket No. E-9565.

[7] As it did, *e.g.*, in *Electric and Water Plant Board of the City of Frankfort, Ky.* v. *Kentucky Utilities Company, et al.*, Op. No. 15, 15 F.P.S. 5-314 (1978).

reason that the effect of the modification would be to expand the utility's transmission obligation. But, until the court below wrote, such actions were never conceived as compelling wheeling within the intendment of §§ 211 and 212 nor, prior to enactment of these sections, as being beyond the authority of the Commission.

Here, NYSEG's obligation to wheel under its contract NS-11 with PASNY is limited overall to the capacity of its transmission system in excess of its own needs. Assuming, arguendo, that the Commission's invalidation of the territorial restrictions in that contract and NYSEG's contract with Penn Yan might result in NYSEG's having to transmit a marginally larger amount of power to Penn Yan, the orders of the Commission, after all, did not compel wheeling within the contemplation of §§ 211 and 212, they simply invalidated territorial restrictions found to be unjust, unreasonable and anticompetitive.

Without calling upon §§ 211 and 212, the Commission was clearly authorized to take this action under §§ 205 and 206. The decision below, to the contrary, seriously erodes the Commission's jurisdiction under these vital sections of the Federal Power Act and, while standing, will substantially impair the Commission's ability to discharge its responsibilities under the Act.

III.

The decision below conflicts with this Court's determinations that the Commission, as other agencies, has regulatory authority over services initiated by a regulated industry even where the Commission lacks authority originally to compel the industry to provide such services. It also conflicts with decisions by the District of Columbia Circuit that the Commission may regulate an

activity initiated by an electric utility even where the Commission is specifically prohibited from ordering that the activity be initiated by the electric utility.

While, prior to adoption of §§ 211 and 212, the Commission was without power to compel a jurisdictional utility to originate transmission services, it has never been doubted, once a utility undertakes to provide such services, that its contracts relating thereto are squarely subject to regulation by the Commission under §§ 205 and 206. The language of the statute to this effect could hardly be more clear.

Once a utility has incurred an obligation to wheel, voluntarily or by judicial compulsion, *Otter Tail Power Co.* v. *United States,* 410 U.S. 366 (1973) and *Richmond Power & Light* v. *FERC,* 574 F.2d 610 (D.C. Cir. 1978), show that the terms and conditions of its undertaking are subject to regulation by the Commission.[8]

Under the Federal Power Act, pooling, like wheeling, is essentially voluntary in the first instance. *See* 16 U.S.C. § 202(a). Yet, the District of Columbia Circuit has ruled that FERC has authority to increase services

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[8] The decree of the district court, as quoted with approval and affirmed in *Otter Tail,* expressly provided that, upon creation of the general obligation to wheel by judicial order, the terms and conditions would be regulated by the Commission. 410 U.S. at 375. The separate opinion of Mr. Justice Stewart noted that "the terms and conditions of interconnections and wheeling arrangements voluntarily entered into" are subject to regulation by the Commission under §§ 205 and 206. *Id.* at 390, n.7.

In *Richmond Power & Light,* the court is clear that, had Richmond availed itself of the opportunity afforded by the Commission and shown that the activities complained of were unreasonably anticompetitive or discriminatory, the Commission would have been empowered to compel the respondent there to wheel to Richmond. 574 F.2d at 623-24.

required in a voluntary pooling agreement pursuant to § 206 of the Federal Power Act "if, in the absence of such modifications, the Agreement presented ' any rule, regulation, practice or contract [that was] unjust, unreasonable, unduly discriminatory or preferential.' " *Central Iowa Power Cooperative* v. *FERC*, 606 F.2d 1156, 1168 (D.C. Cir. 1979); *see Municipalities of Groton* v. *FERC*, 587 F.2d 1296, 1301-03 (D.C. Cir. 1978).

Practically every time the Commission has occasion, under § 206, to repair a provision in a transmission contract that is unjust, unreasonable, unduly discriminatory or preferential, it necessarily affects the wheeling obligation of the contractor.

The Court has long differentiated between the authority of an agency to regulate activities voluntarily undertaken and the authority to compel one to undertake such activities initially.

> While no one can be compelled to engage in the business of a common carrier, yet, when he does so, certain duties are imposed which can be enforced by mandamus or other suitable remedy.

Missouri Pacific Railway Co. v. *Larabee Flour Mills Co.*, 211 U.S. 612, 619 (1908).

The Court has consistently endorsed the activities of regulatory agencies in preventing discrimination where, as here, their mandates charge them to see that the conduct of the regulated industries is nondiscriminatory. Specifically, the Court has approved elimination by an agency of discrimination from services voluntarily undertaken by a regulated industry when power originally to require the industry to provide such services was withheld from the agency by its organic and enabling

statute. Cases involving the Interstate Commerce Commission[9] make this point. *See, e.g., American Trucking Associations, Inc.* v. *Atchison, Topeka, and Santa Fe Railway Co.*, 387 U.S. 397, 410-11 (1967); *United States* v. *Capital Transit Co.*, 325 U.S. 357, 364-65 (1945); *Louisville & Nashville Railroad Co.* v. *United States*, 238 U.S. 1, 19 (1914).[10]

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[9] The Interstate Commerce Act and the Federal Power Act are similar. *Compare* 16 U.S.C. §§ 824d and 824e *with* 49 U.S.C. §§ 6 and 15. Such similarity is not accidental. Before it passed part II of the Federal Power Act, Congress was informed by a principal witness for the Commission that:

> . . . every one of the regulatory provisions in this bill has a clear analogy in the Interstate Commerce Act or the Communications Act.

Public Utility Holding Companies: Hearings Before the House Committee on Interstate and Foreign Commerce, 74th Cong., 1st Sess. at 2170 (1935).

[10] *Louisville & Nashville*, in which the Court held that the Interstate Commerce Commission could regulate an activity even though it was statutorily prohibited from ordering the initiation of the activity, was specifically cited to Congress during consideration of the Federal Power Act. *See Public Utility Holding Company Act of 1935: Hearings Before the Senate Committee on Interstate Commerce*, 74th Cong., 1st Sess. at 805 (1935). However, Congress specifically provided for regulation of wheeling contracts. In contrast, Congress specifically excluded intrastate matters from the reach of the Federal Power Act. 16 U.S.C. §§ 824(a) and 824(b). As the Court noted in *FPC* v. *Conway Corp.*, 426 U.S. 271, 277 (1976), Congress so acted to eliminate the potential that the Commission could increase nonjurisdictional rates by exercising its powers pursuant to §§ 205 and 206 to eliminate discrimination.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the court of appeals.

Respectfully submitted,

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May 1981

APPENDIX

APPENDIX A

Federal Power Act, 16 U.S.C. §791a

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES

16 U.S.C. §824d

Sec. 205.

(a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any tranmission or sale subject to the jursidiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

POWER OF COMMISSION TO FIX RATES AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSMISSION

16 U.S.C. §824e

Sec. 206.

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

* * *

WHEELING AUTHORITY

16 U.S.C. §824j

Sec. 211.

(a) Transmission service by any electric utility; notice, hearing and findings by Commission

Any electric utility, geothermal power producer (including a producer which is not an electric utility), or Federal power marketing agency may apply to the Commission for an order under this subsection requiring any other electric utility to provide transmission services to the applicant (including any enlargement of transmission capacity necessary to provide such services). Upon receipt of such application, after public notice and notice to each affected State regulatory authority, each affected electric utility, and each affected Federal power marketing agency, and after affording an opportunity for an

evidentiary hearing, the Commission may issue such order if it finds that such order—

(1) is in the public interest,

(2) would—

(A) conserve a significant amount of energy,

(B) significantly promote the efficient use of facilities and resources, or

(C) improve the reliability of any electric utility system to which the order applies, and

(3) meets the requirements of section 824k of this title.

(b) Transmission service by sellers of electric energy for resale; notice, hearing and determinations by Commission

Any electric utility, or Federal power marketing agency, which purchases electric energy for resale from any other electric utility may apply to the Commission for an order under this subsection requiring such other electric utility to provide transmission services to the applicant (including any increase in transmission capacity necessary to provide such services). Upon receipt of an application under this subsection, after public notice and notice to each affected State regulatory authority, each affected electric utility, and each affected Federal power marketing agency, and after affording an opportunity for an evidentiary hearing, the Commission may issue such an order if the Commission determines that—

(1) such other electric utility has given actual or constructive notice that it is unwilling or unable to provide electric service to the applicant and has been requested by the applicant to provide the transmission services requested in the application under this subsection, and

(2) such order meets the requirements of section 824k of this title.

(c) Preservation of competitive relationships; replacement of electric energy; inconsistent state laws

(1) No order may be issued under subsection (a) of this section unless the Commission determines that such order would reasonably preserve existing competitive relationships.

(2) No order may be issued under subsection (a) or (b) of this section which requires the electric utility subject to the order to transmit, during any period, an amount of electric energy which replaces any amount of electric energy—

(A) required to be provided to such applicant pursuant to a contract during such period, or

(B) currently provided to the applicant by the utility subject to the order pursuant to a rate schedule on file during such period with the Commission.

(3) No order may be issued under the authority of subsection (a) or (b) of this section which is inconsistent with any State law which governs the retail marketing areas of electric utilities.

(4) No order may be issued under subsection (a) or (b) of this section which provides for the transmission of electric energy directly to an ultimate consumer.

(d) Termination or modification or order; notice, hearing and findings of Commission; contents of order; inclusion in order of terms and conditions agreed upon by parties

(1) Any electric utility ordered under subsection (a) or (b) of this section to provide transmission services may apply to the Commission for an order permitting such electric utility to cease providing all, or any portion of, such services. After public notice, notice to each affected State regulatory authority, each affected Federal power marketing agency, and each affected electric utility, and after an opportunity for an evidentiary hearing, the Commission shall issue an order terminating or modifying the order issued under subsection (a) or (b) of this section, if the electric utility providing such transmission services has demonstrated, and the Commission has found, that—

(A) due to changed circumstances, the requirements applicable, under this section and section 824k of this title, to the issuance of an order under subsection (a) or (b) of this section are no longer met, or

(B) any transmission capacity of the utility providing transmission services under such order which was, at the time such order was issued, in excess of the capacity necessary to serve its own customers is no longer in excess of the capacity necessary for such purposes.

No order shall be issued under this subsection pursuant to a finding under subparagraph (A) unless the Commission finds that such order is in the public interest.

(2) Any order issued under this subsection terminating or modifying an order issued under subsection (a) or (b) of this section shall—

(A) provide for any appropriate compensation, and

(B) provide the affected electric utilities adequate opportunity and time to—

(i) make suitable alternative arrangements for any transmission services terminated or modified, and

(ii) insure that the interests of ratepayers of such utilities are adequately protected.

(3) No order may be issued under this subsection terminating or modifying any order issued under subsection (a) or (b) of this section if the order under subsection (a) or (b) of this section includes terms and conditions agreed upon by the parties which—

(A) fix a period during which transmission services are to be provided under the order under subsection (a) or (b) of this section, or

(B) otherwise provide procedures or methods for terminating or modifying such order (including, if appropriate, the return of the transmission capacity when necessary to take into account an increase, after the is-

suance of such order, in the needs of the electric utility subject to such order for transmission capacity).

(e) Definitions

As used in this section, the term "facilities" means only facilities used for the generation or transmission of electric energy.

ORDERS REQUIRING INTERCONNECTION OR WHEELING

16 U.S.C. §824k

Sec. 212

(a) Determinations by Commission

No order may be issued by the Commission under section 824i of this title or subsection (a) or (b) of section 824j of this title unless the Commission determines that such order—

(1) is not likely to result in a reasonably ascertainable uncompensated economic loss for any electric utility, qualifying cogenerator, or qualifying small power producer, as the case may be, affected by the order;

(2) will not place an undue burden on an electric utility, qualifying cogenerator, or qualifying small power producer, as the case may be, affected by the order;

(3) will not unreasonably impair the reliability of any electric utility affected by the order; and

(4) will not impair the ability of any electric utility affected by the order to render adequate service to its customers.

The determination under paragraph (1) shall be based upon a showing of the parties. The Commission shall have no authority under section 824i or 824j of this title to compel the enlargement of generating facilities.

(b) Reimbursement of parties subject to orders

No order may be issued under section 824i of this title or subsection (a) or (b) of section 824j of this title unless the applicant for such order demonstrates that he is ready, willing, and able to reimburse the party subject to such order for —

(1) in the case of an order under section 824i of this title, such party's share of the reasonably anticipated costs incurred under such order, and

(2) in the case of an order under subsection (a) or (b) of section 824j of this title—

(A) the reasonable costs of transmission services, including the costs of any enlargement of transmission facilities, and

(B) a reasonable rate of return on such costs, as appropriate, as determined by the Commission.

(c) Issuance of proposed order; agreement by parties to terms and conditions of order; approval by Commission; inclusion in final order; failure to agree

(1) Before issuing an order under section 824i of this title or subsection (a) or (b) of section 824j of this title, the Commission shall issue a proposed order and set a reasonable time for parties to the proposed interconnection or transmission order to agree to terms and conditions under which such order is to be carried out, including the apportionment of costs between them and the compensation or reimbursement reasonably due to any of them. Such proposed order shall not be reviewable or enforceable in any court. The time set for such parties to agree to such terms and conditions may be shortened if the Commission determines that delay would jeopardize the attainment of the purposes of any proposed order. Any terms and conditions agreed to by the parties shall be subject to the approval of the Commission.

(2)(A) If the parties agree as provided in paragraph (1) within the time set by the Commission and the Commission approves such agreement, the terms and conditions shall be included in the final order. In the case of an order under section 824i of this title, if the parties fail to agree within the time set by the Commission or if the Commission does not approve any such agreement, the Commission shall prescribe

such terms and conditions and include such terms and conditions in the final order.

(B) In the case of any order applied for under section 824j of this title, if the parties fail to agree within the time set by the Commission, the Commission shall prescribe such terms and conditions in the final order.

(d) Statement of reasons for denial

If the Commission does not issue any order applied for under section 824i or 824j of this title, the Commission shall, by order, deny such application and state the reasons for such denial.

(e) Utilization of interconnection or wheeling authority in lieu of other authority; limitation of Commission authority

No provision of section 824i or 824j of this title shall be treated—

(1) as requiring any person to utilize the authority of such section 824i or 824j of this title in lieu of any other authority of law, or

(2) as limiting, impairing, or otherwise affecting any authority of the Commission under any other provision of law.

* * *

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 714—September Term, 1979

(Argued March 31, 1980

Decided September 30, 1980)

Docket No. 79-4185

NEW YORK STATE ELECTRIC & GAS CORPORATION,

Petitioner,

—v.—

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent,

VILLAGE OF PENN YAN, NEW YORK, MUNICIPAL ELECTRIC UTILITIES ASSOCIATION OF NEW YORK STATE,

Intervenors.

Before:

VAN GRAAFEILAND and KEARSE, *Circuit Judges*, and GOETTEL, *District Judge.**

* Honorable Gerard L. Goettel, Judge of the United States District Court for the Southern District of New York, sitting by designation.

Petition to review orders of the Federal Energy Regulatory Commission which required respondent to file contracts with the Commission, and declared certain provisions of the contracts invalid.

Affirmed in part, vacated in part and remanded.

FREDERIC H. LAWRENCE, New York, N.Y. (Kenneth M. Jasinski, Huber Magill Lawrence & Farrell, New York, N.Y., on the brief), *for petitioner.*

JANE C. MURPHY, Washington, D.C. (Robert R. Nordhaus, General Counsel, Jerome Nelson, Solicitor, Federal Energy Regulatory Commission, Washington, D.C., on the brief), *for respondent.*

J. CATHY LICHTENBERG, Washington, D.C. (Frederick D. Palmer, Duncan, Weinberg, Palmer & Miller, P.C., Washington, D.C., on the brief), *for intervenors.*

KEARSE, *Circuit Judge:*

This is a petition by New York State Electric & Gas Corporation ("NYSEG") for review of orders of the Federal Energy Regulatory Commission (the "Commission"), invalidating certain provisions in contracts entered into by NYSEG with, respectively, the Power Authority of the State of New York ("PASNY") and the Village of Penn Yan, New York ("Penn Yan" or the "Village") on the grounds that the provisions violated

federal antitrust policy. NYSEG contends that the orders should be vacated because the Commission lacked jurisdiction over the contracts in question, because principles of state immunity make federal antitrust policy inapplicable, and because the Commission failed to comply with pertinent provisions of the Federal Power Act ("FPA").

We conclude that the Commission has jurisdiction to require the filing and modification of the challenged contracts, but that a hearing should have been held in order for the Commission to assess the public interest in those contracts and that the Commission's orders, without complying with statutory requirements, require the provision of transmission services, known as "wheeling," within the meaning of § 211 of the FPA. Accordingly, we vacate the orders and remand to the Commission for proceedings consistent with §§ 206, 211 and 212 of the FPA.

I. FACTUAL BACKGROUND[1]

A. *The Parties and the Contracts*

NYSEG is a New York corporation engaged in the generation, purchase, transmission and wholesale and retail distribution of electric power and energy. It is a public utility subject to the provisions of the FPA; it provides transmission services to PASNY and sells or has sold power to Penn Yan and other communities.

Village of Penn Yan is a municipal corporation located in Yates County, New York. It owns an electric

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[1] Since the Commission entered its order without holding an evidentiary hearing, our summary of the facts is drawn from the various documents filed with the Commission.

utility, Penn Yan Municipal Board, which is a wholesale purchaser and retail distributor of electric energy. References to "Penn Yan" include its electric utility.

PASNY is "a political subdivision" of New York State which is responsible for helping to maximize "beneficial use" of the Niagara and St. Lawrence Rivers, including the development of hydroelectric power. N.Y. Pub. Auth. Law (McKinney) §§ 1002, 1001 (1970 & Supp. 1979-1980). Under the New York Power Authority Act, PASNY is directed and authorized, *inter alia,* to "make provision so that municipalities and other political subdivisions of the state . . . may secure a reasonable share of the power generated" by the Niagara and St. Lawrence hydroelectric projects, and to construct or acquire, by contract, the use of transmission lines to conduct electricity to purchasers. N.Y. Pub. Auth. Law (McKinney) §§ 1005.5, 1005.7 (Supp. 1979-1980). PASNY generates energy at the Niagara Power Project and sells that power on a wholesale basis to NYSEG and to other customers by means of transmission lines furnished by NYSEG.

The Commission, successor to the Federal Power Commission,[2] has jurisdiction over all facilities for "the transmission of electric energy in interstate commerce and . . . the sale of electric energy at wholesale in interstate commerce." FPA § 201, 16 U.S.C. § 824(b) (1976). It has the power to identify and remedy certain unjust or unreasonable rates, charges or contracts of public utilities. FPA § 206, 16 U.S.C. § 824e (1976).

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2 Initially, enforcement powers under the FPA were granted to the Federal Power Commission. Effective October 1, 1977, the duties of the Federal Power Commission were subsequently transferred to the Federal Energy Regulatory Commission, 42 U.S.C. § 7172(b) (Supp. II 1978). References herein to "Commission" include both the present commission and its predecessor.

The present proceeding involves a 1961 contract between NYSEG and PASNY, referred to as NS-11, and a 1962 agreement between NYSEG and Penn Yan. The controversy arises out of the desire of Penn Yan for a modification of those contracts.

The 1961 contract between NYSEG and PASNY, NS-11, recited PASNY's intention "to enter into agreements . . . for the sale, transmission and distribution of power and energy from the [Niagara hydroelectric power development] Project with municipalities and rural electric cooperatives operating electric systems serving rural and domestic consumers within [PASNY's] Niagara market area," and provided that NYSEG would maintain "transmission facilities capable of transmitting Project power within the limits herein provided to such prospective purchasers from [PASNY]." The contract further provided that NYSEG would accept delivery of Project power "into its electric transmission system . . . and . . . deliver an equivalent amount of electric power and energy . . . to [PASNY] for its own use or for municipalities and rural electric cooperatives." Article X, Paragraph 3 of NS-11, limited NYSEG's obligation to deliver power for PASNY as follows:

> The electric power and energy to be delivered by [NYSEG] to [PASNY] for customers from the system of [NYSEG] will be limited to such electric power and energy as is necessary for the use, distribution and resale *within the area limits served as of the date hereof by* the Villages of Bath, Castile, Endicott, Greene, Groton, Marathon, *Penn Yan,* Silver Springs and Watkins Glen, Chautauqua-Cattaraugus Electric Cooperative, Inc. and Steuben Rural Electric Cooperative, Inc., and

> for such other loads and customers of [PASNY] as may be mutually agreed upon from time to time.

(Emphasis added.) Thus, the NYSEG agreement with PASNY did not obligate NYSEG to transmit Project power for the use of any area annexed to Penn Yan after 1961.

In 1962, NYSEG and Penn Yan entered into a contract which terminated a 1956 agreement pursuant to which Penn Yan had been a wholesale purchaser of power from NYSEG. In the 1956 contract, Penn Yan had agreed to purchase from NYSEG all of the electrical energy required within the existing territorial limits of the Village and its franchise area for a 10-year period. In 1962, however, Penn Yan decided to purchase its power from PASNY instead of NYSEG, and so notified NYSEG. NYSEG took the position that this would constitute a breach of the 1956 agreement and would result in damages to NYSEG in the amount of $95,910.48. Penn Yan decided to pay NYSEG this amount to buy out of the 1956 agreement. Reciting (a) that Penn Yan "believe[s] that it is to its financial advantage to obtain its electrical energy requirements" from PASNY, (b) that the required energy to be supplied to PASNY could be delivered through NYSEG's transmission facilities "under an appropriate contract" between NYSEG and PASNY, and (c) that NYSEG "has entered into an agreement with [PASNY] for the delivery by [NYSEG] of such power and energy as is necessary for the use, distribution and resale within the area limits served as of February 10, 1961" by Penn Yan, the 1962 agreement terminated the 1956 agreement, required Penn Yan to pay NYSEG $95,910.48 in settlement of its claims, freed Penn Yan

to contract with PASNY for supply of Penn Yan's energy needs, and required NYSEG to continue to supply Penn Yan with energy until such time as PASNY commenced to do so. Paragraph 3 of this agreement, however, included the following limitation:

> [Penn Yan] will take from [PASNY] under such contract only such electric energy required by the Village within the territorial limits, as of February 10, 1961, of the Village and its franchise area outside the Village as approved by the Public Service Commission of the State of New York, (a) for its own use, and (b) for distribution and resale to its existing and future customers.

This territorial limit was identical (with the exception, of course, of the date) to the limit provided in the 1956 agreement, and corresponded to the limit on NYSEG's obligation to transmit PASNY energy as set out in Article X, Paragraph 3 of NS-11.

In 1967, Penn Yan annexed an area known as Excell Estates, which had been part of the Town of Milo, a customer of NYSEG. Three years later, Penn Yan sought a modification of the 1962 agreement to permit the Village to serve as distributor to residential customers in Excell Estates. NYSEG denied the request, noting that "Paragraph 3 of [the 1962] Agreement was specifically designed to preserve the territorial integrity of [NYSEG's] franchise area as of February 10, 1961."[3] In March 1978, Penn Yan again

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3 NYSEG had agreed in 1968 to modify the contract to permit Penn Yan Municipal Board to provide street lighting in Excell Estates, but its response to the 1970 request stated that "[t]he reason for permitting a modification in the case of municipal street lighting does not obtain with respect to the provision for residential electric service."

requested a modification to enable it to supply power to Excell Estates. Again NYSEG refused.

B. *Proceedings Before the Commission*

On May 25, 1978, Penn Yan filed with the Commission a petition for a declaratory order invalidating Article X, Paragraph 3 of NS-11 insofar as it limited the territories of Penn Yan and other communities to which NYSEG was required to transmit power for PASNY. The petition claimed, *inter alia,* that the contract provision violated the Niagara Redevelopment Act of 1957 ("NRA") and the FPA, as well as state and federal public policy. Penn Yan subsequently moved to compel the filing by NYSEG of the 1962 agreement, and sought a declaration that Paragraph 3 of that agreement also was unenforceable.

On July 20, 1978, NYSEG sought to intervene in the proceeding on Penn Yan's petition and opposed the petition on various grounds. In addition to challenging the jurisdiction of the Commission under the FPA and the NRA, NYSEG contended that neither its 1961 contract with PASNY nor its 1962 contract with Penn Yan attempted to restrict the area that Penn Yan could serve or the amount of power that Penn Yan could obtain from PASNY. The petition stated that

> NYSEG has declined to further modify its transmission obligation under NS-11 Paragraph 3 . . . because, in the exercise of sound business judgment, NYSEG has determined that it would not be in the public or its corporate interest . . . when the result would be an unwarranted duplication of electric service in Excell Estates.

In addition, the petition contended that "[t]he relief requested by Penn Yan, if granted, would only result in the Commission compelling NYSEG to 'wheel' power involuntarily for a direct competitor,"[4] and NYSEG argued that neither the FPA nor the NRA requires NYSEG to provide unlimited transmission services.

After receiving the above petitions, as well as comments from PASNY[5] and several supplementary filings by Penn Yan and NYSEG, but without holding a hearing, the Commission, on March 28, 1979, rejected all of NYSEG's arguments and declared Article X, Paragraph 3 of NS-11, along with Paragraph 3 of the NYSEG-Penn Yan agreement and any similar NYSEG agreements with other customers, unenforceable.[6] As to its jurisdiction, the Commission stated:

> Under Section 201(b) of the Federal Power Act, a jurisdictional utility is one which sells or transmits electric energy at wholesale in interstate com-

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4 "Wheeling" has been defined as a "transfer by direct transmission or displacement electric power from one utility to another over the facilities of an intermediate utility." *Otter Tail Power Co. v. United States*, 410 U.S. 366, 368 (1973). In this case, the transfer of power from PASNY to Penn Yan Municipal Board through the transmission lines of NYSEG constitutes wheeling.

5 On July 19, 1978, PASNY sent the Commission a letter taking the position that the PASNY-NYSEG contract is not restrictive since it permits service to "such other loads and customers of [PASNY] as may be mutually agreed upon from time to time," and contending that Penn Yan's difficulties stem solely from its own agreement with NYSEG. In that letter and subsequently, PASNY reserved its right, as a signatory to NS-11, to participate in the proceeding if the Commission should decide to consider Penn Yan's petition.

6 The order required NYSEG, pursuant to FPA § 205, to file NS-11, the 1962 agreement with Penn Yan, and any similar contracts. On April 27, 1979, under protest, NYSEG filed its contracts with PASNY, Penn Yan, and the villages of Bath, Castile, Endicott, Greene, Groton, Marathon, Silver Springs, and Watkins Glen.

> merce. Therefore the 1962 Agreement and the provision of the NS-11 contract which provide for NYSEG transmission of PASNY power at wholesale to Penn Yan are contracts subject to our jurisdiction. While PASNY is exempt from our jurisdiction as a public authority under Section 201(f), NYSEG is a jurisdictional utility and must file these contracts under Section 205(c).

Declaratory Order Modifying Jurisdictional Contracts ["Order"], Docket No. EL78-29 (March 28, 1979) at 4. As to the reasonableness of the challenged contract provisions, the Commission found those provisions to be a direct resale prohibition which served to "protect NYSEG from competition for retail customers and to restrict Penn Yan's ability to extend its municipal system, thereby impairing and diminishing competition to serve retail customers in the extended territories." Characterizing NYSEG's petition as admitting an anticompetitive purpose, the Commission ruled that the provisions violated federal antitrust policy. Finally, as to NYSEG's argument that the requested modification of the contracts would result in an order compelling wheeling, the Commission pointed out that NS-11 itself obligates NYSEG to wheel, and that the challenged provision of NS-11 places restrictions on the purchasers' *use* of wheeled power. Thus, the Commission characterized its order as one that removes a contractual restriction on the use of wheeled power rather than as one that actually compels wheeling.

On April 24, 1979, NYSEG sought a rehearing, again urging, *inter alia,* that the removal of the territorial limitations resulted in an order compelling wheeling, and arguing that, although such an order was within

the Commission's authority under newly enacted statutory provisions,[7] there had been no compliance with the substantive or procedural requirements of those provisions, FPA §§ 211, 212, 16 U.S.C.A. §§ 824j, 824k (Supp. 1980). In addition, NYSEG argued that the Commission lacked authority to issue the orders in question because PASNY has sole authority to determine the reasonableness of its contracts and because the challenged provisions were protected from antitrust scrutiny by state action immunity.

After an initial order granting rehearing for the limited purpose of reconsideration, the Commission denied the application for rehearing, again rejecting all of NYSEG's contentions.[8] The Commission reiterated its view that the order did not compel wheeling and concluded, therefore, that §§ 211 and 212 were inapplicable. In addition, it ruled that no evidentiary hearing was needed since "the pleadings and the contracts themselves provide a sufficient factual basis for the Commission's finding that the disputed provision is anticompetitive in effect and serves no countervailing public interest objective." Order Denying Rehearing, EL78-29 (September 17, 1979) at 5. This petition for review followed.

II. DISCUSSION

NYSEG asserts here essentially the same arguments it pressed before the Commission. It challenges the

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7 *See* part II.C., *infra*.

8 The filing and denial of an application for rehearing were prerequisites to this Court's appellate jurisdiction pursuant to 16 U.S.C. § 825*l* (1976).

Commission's jurisdiction to modify its agreement with PASNY, it asserts that federal antitrust policy is inapplicable in light of PASNY's status as a political subdivision of New York State, and it contends that the Commission's order impermissibly requires NYSEG to wheel power to Penn Yan and other municipal utilities. For the reasons set forth below, we reject NYSEG's jurisdictional and antitrust immunity contentions, but conclude that the Commission's orders should not have been issued without hearings for the consideration of pertinent factors as set forth in FPA §§ 206, 211 and 212.

A. *Jurisdiction of the Commission*

In support of its attack on the Commission's jurisdiction to review NS-11, NYSEG contends (1) that contracts to which PASNY is a party are exempted from Commission review under FPA § 201(f), and (2) that PASNY has exclusive jurisdiction under the NRA to determine the reasonableness of its own contracts. Neither contention is sound.

1. *The Federal Power Act*

The FPA was enacted as Part II, of Title II of the Public Utility Act of 1935, 49 Stat. 847. The two primary purposes of the Act were "to curb abusive practices of public utility companies by bringing them under effective control, and to provide effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce. 49 Stat. 803-804, 847-848; S.Rep. No. 621, 74th Cong., 1st Sess., 3, 7-8; *Jersey Central Co. v. FPC*, 319 U.S. 61, 67-68 (1943); *see North American Co. v. SEC*, 327 U.S.

686 (1946)." *Gulf States Utilities Co. v. FPC*, 411 U.S. 747, 758 (1973). The FPA declares

> that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation . . . and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest.

§ 201, 16 U.S.C. § 824(a) (1976). In accordance with this statement of policy, the provisions of the FPA are made applicable "to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce";[9] the Commission is given "jurisdiction over all facilities for such transmission or sale of electric energy." § 201(b), 16 U.S.C. § 824(b).

In order to facilitate administrative regulation of interstate sales and transmissions, the FPA requires all public utilities[10] to file with the Commission "schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts

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9 FPA § 201(d) defines "sale of electric energy at wholesale" as "a sale of electric energy to any person for resale." 16 U.S.C. § 824(d) (1976).

10 The FPA defines "public utility" as "any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter." § 201(e), 16 U.S.C. § 824(e) (1976).

which in any manner affect or relate to such rates, charges, classifications, and services." § 205(c), 16 U.S.C. § 824d(c) (1976). Any changes in rates, charges, etc., similarly must be filed with the Commission. § 205(d), 16 U.S.C. § 824d(d) (1976).

Section 205 of the Act mandates that public utility rates and charges be "just and reasonable," 16 U.S.C. § 824d(a) (1976), and the Commission is empowered under § 206 to examine the reasonableness of rates, charges and related contracts and to order remedial modifications:

> Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

16 U.S.C. § 824e(a) (1976). A finding that the existing provision is " 'unjust, unreasonable, unduly discriminatory or preferential' " is a condition precedent to the Commission's exercise of its power to fix a just and reasonable provision. *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 353 (1956).

Section 201(f) of the FPA exempts states and their political subdivisions from the provisions of the FPA, as follows:

> No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

16 U.S.C. § 824(f) (1976). NYSEG argues that this provision, notwithstanding the Commission's broad powers detailed above, deprives the Commission of jurisdiction to modify any contract involving PASNY.

While there is some surface appeal to NYSEG's argument that modification of an agreement between itself and PASNY is not possible without affecting PASNY, the substance of the Commission's action negatives the conclusion that the Commission seeks to apply provisions of the FPA to PASNY. The orders challenged do not require PASNY to take or to refrain from taking action; they do not place any limitations on PASNY's powers or prerogatives. Rather, the Commission's order is directed strictly to NYSEG, requiring NYSEG to file its contracts with the Commission, and precluding NYSEG from enforcing certain provisions of those contracts. The thrust of the order is that, *if* PASNY contracts to sell power to Penn Yan for Excell Estates, NYSEG must provide transmission services for that power under its contract with PASNY *if* PASNY so requests. PASNY has no greater obligations as a result of the Commission's order.

The present case is thus plainly distinguishable from *Northern California Power Agency v. FPC*, 514 F.2d

184 (D.C. Cir.), *cert. denied*, 423 U.S. 863 (1975), the sole case relied upon by NYSEG to support its claim that § 201(f) deprives the Commission of jurisdiction. In that case, the Northern California Power Agency ("NCPA") filed a complaint with the Commission alleging that contracts between a jurisdictional utility, Pacific Gas & Electric ("PG&E"), and an exempt public agency, Sacramento Municipal Utility District ("SMUD"), were anticompetitive. NCPA sought an order declaring that these contracts were unlawful and could be made lawful only by being amended to provide for an increase in SMUD's thermal units, with the excess capacity made available to NCPA. The Commission denied NCPA's request for a hearing on the antitrust implications of the PG&E-SMUD contracts, in part on the ground that it lacked jurisdiction to order the remedy sought. The court of appeals affirmed, noting that "[t]he Commission simply does not possess the authority to order . . . capacity increases in SMUD's nuclear plants" and that the clear import of the requested relief would be to require the Commission to do indirectly what it cannot do directly. 514 F.2d at 189. Accordingly, the court concluded that "the Commission's jurisdictional reasons for not further investigating NCPA's charges appear well-founded" and that the Commission's summary disposition of NCPA's charges was not an abuse of discretion. *Id.*

Here, by contrast, the requested relief does not, either directly or indirectly, affect the amount of power PASNY is required to provide to any purchaser or the amount of transmission service PASNY is required to purchase from NYSEG. The entire burden of the Commission's order is placed on NYSEG, over which jurisdiction is clear.

Nor do the other cases cited by NYSEG have any bearing on the Commission's jurisdiction. Both *Airco Alloys Division, Airco, Inc. v. Niagara Mohawk Power Corp.*, 65 A.D. 2d 378, 411 N.Y.S.2d 460 (4th Dep't 1978), and *Power Authority of the State of New York v. Federal Energy Regulatory Commission, et al.*, Civ. No. 79-310 (W.D.N.Y. Feb. 22, 1980), involved a contract between PASNY and Niagara Mohawk Power Corp. entered into in 1961 pursuant to the Niagara Redevelopment Act, 16 U.S.C. § 836(b)(3) (1976). Subsection (b)(3) of that Act requires, as a condition of PASNY's license, that PASNY contract to sell to Niagara Mohawk 445,000 kilowatts of project power "for resale generally to the industries which purchase power produced by [Niagara Mohawk] prior to" June 7, 1956. The subsection was incorporated, as Article 22, in the PASNY-Niagara Mohawk contract. Subsequently, approximately one-fourth of the allocated power was no longer utilized by industries to which it had been allocated prior to 1956, and Niagara Mohawk took the position that this reduced Niagara Mohawk's obligations pro tanto. PASNY commenced a proceeding before the Commission for a declaration that Niagara Mohawk was contractually required to sell the entire 445,000 kilowatts of power to industries in Western New York. The Commission dismissed the petition for lack of jurisdiction; no appeal was taken.

The issues dealt with in the two court cases involved the jurisdiction of the respective courts, not that of the Commission. Thus, in *Airco Alloys v. Niagara Mohawk, supra,* the state court rejected an argument that it lacked jurisdiction because 16 U.S.C. § 825p (1976) grants exclusive jurisdiction over violations of the FPA

to federal district courts. The court noted that the plaintiff was not claiming a violation of the FPA or the NRA, but rather noncompliance with the PASNY-Niagara Mohawk contract, and that § 825p did not prevent a state court from deciding whether plaintiff's contractual rights had been violated. Likewise, in *PASNY v. Federal Energy Regulatory Commission, supra,* there was no allegation of a violation of federal statute, and the federal court held that it lacked jurisdiction simply because the suit was "in essence a declaratory judgment action to clarify the terms of [PASNY's] contract with Niagara Mohawk." The question of the Commission's jurisdiction was not before the district court, since review of the Commission's dismissal must be sought in a court of appeals rather than in a district court. 16 U.S.C. § 825*l*(b) (1976).

In sum, we have been pointed to no authority, and we know of none, that would deprive the Commission of jurisdiction of the present request by Penn Yan for modification of NYSEG's contracts based on their alleged conflict with federal law.

2. *The Niagara Redevelopment Act*

NYSEG's contention that the NRA gives PASNY sole authority to determine what terms and conditions for the wheeling of Niagara Project power are reasonable has not greater force. The NRA, enacted in 1957, "expressly authorized and directed [the Commission] to issue a license to the Power Authority of the State of New York for the construction and operation of a power project with capacity to utilize all of the United States share of the water of the Niagara River

permitted to be used by international agreement."[11] 16 U.S.C. § 836(a) (1976). In addition to "those [conditions] deemed necessary and required under the terms of the Federal Power Act," the Commission was instructed to include in PASNY's license several provisions, including the following:

> The licensee shall, if available *on reasonable terms and conditions,* acquire by purchase or other agreement, the ownership or use of, or if unable to do so, construct such transmission lines as may be necessary to make the power and energy generated at the project available in wholesale quantities for sale on fair and reasonable terms and conditions to privately owned companies, to the preference customers enumerated in paragraph (1) of this subsection, and to the neighboring States in accordance with paragraph (2) of this subsection.

16 U.S.C. § 836(b)(4) (1976) (emphasis added). NYSEG asks us to construe this provision as giving PASNY exclusive authority to determine whether or not its contracts are fair and reasonable, and contends that support for this view may be found in a negative inference to be drawn from NRA § 836(b)(2). Subsection (b)(2) requires that the Commission condition PASNY's license on PASNY's making a reasonable

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11 The purpose of the Niagara Redevelopment Act was "to authorize the construction of a hydroelectric power project on the Niagara River at Niagara Falls, N.Y., which would utilize all of the United States share of the amount of water in the Niagara River made available for power redevelopment under the terms of a treaty between the United States and Canada entered into in 1950." H.R. Rep. No. 862, 85th Cong., 1st Sess. (1957), *reprinted in* [1957] *U.S. Code Cong. & Ad. News* 1585, 1586.

portion of Niagara Project power available to neighboring states, and provides that "[i]n the event of disagreement between [PASNY] and the power-marketing agencies of any such States, the [Commission] may, after public hearings, determine and fix the applicable portion of power to be made available and the terms applicable thereto."[12] NYSEG argues that

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12 Subsection (b) provides in pertinent part as follows:

> (b) The Federal Power Commission shall include among the licensing conditions, in addition to those deemed necessary and required under the terms of the Federal Power Act [16 U.S.C. 791a et seq.], the following:
>
> (1) In order to assure that at least 50 per centum of the project power shall be available for sale and distribution primarily for the benefit of the people as consumers, particularly domestic and rural consumers, to whom such power shall be made available at the lowest rates reasonably possible and in such manner as to encourage the widest possible use, the licensee in disposing of 50 per centum of the project power shall give preference and priority to public bodies and nonprofit cooperatives within economic transmission distance. In any case in which project power subject to the preference provisions of this paragraph is sold to utility companies organized and administered for profit, the licensee shall make flexible arrangements and contracts providing for the withdrawal upon reasonable notice and fair terms of enough power to meet the reasonably foreseeable needs of the preference customers.
>
> (2) The licensee shall make a reasonable portion of the project power subject to the preference provisions of paragraph (1) of this subsection available for use within reasonable economic transmission distance in neighboring States, but this paragraph shall not be construed to require more than 20 per centum of the project power subject to such preference provisions to be made available for use in such States. The licensee shall cooperate with the appropriate agencies in such States to insure compliance with this requirement. In the event of disagreement between the licensee and the power-marketing agencies of any of such States, the Federal Power Commission may, after public hearings, determine and fix the applicable portion of power to be made available and the terms applicable thereto: *Provided*, That if any such State shall have designated a bargaining agency for the procurement of such power on

since subsection (b)(2) provides for resolution of disputes thereunder by the Commission, the absence of similar provision under subsection (b)(4) means the Commission has no jurisdiction with regard to a dispute under subsection (b)(4).

We find nothing in these or any other sections of the NRA to suggest that PASNY has exclusive authority over its contracts involving transmission of Niagara Project power. Section 836(b)(4) does not strip the Commission of the authority or responsibility for assessing the reasonableness of such contracts; its effect is to require PASNY, as a condition of its license, to insure transmission lines for delivery of its power by agreement for use or purchase of such lines or, if such agreements are not available on reasonable terms, to construct the necessary lines. The implication of the mandate to the Commission to impose conditions is that it will be able to enforce those conditions. We do not view the absence from subsection (b)(4) of provision for public hearings such as are required under (b)(2) for power apportionments between states, as implying that the Commission has no jurisdiction to assure that its licensee complies with other conditions of its license.

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behalf of such State, the licensee shall deal only with such agency in that State. The arrangements made by the licensee for the sale of power to or in such State shall include observance of the preferences in paragraph (1) of this subsection.

The 50% provision in (b)(1) was described as "a satisfactory compromise" between "the Federal preference policy which accords priorities in power marketing to public distribution systems and nonprofit cooperatives" and the state's view that "such preference requirements would adversely affect [PASNY's] ability to sell revenue bonds to finance the construction of the Niagara project." H.R. Rep. No. 862, *supra*, [1957] *U.S. Code Cong. & Ad. News* at 1593.

NYSEG's reliance on *Airco Alloys v. Niagara Mohawk, supra,* is similarly misplaced. As discussed *supra,* the New York court there merely upheld its own jurisdiction to decide whether PASNY's contractual rights were violated. That decision thus has no bearing on the Commission's jurisdiction to determine the reasonableness, within the meaning of that word under the NRA, of a term included in a PASNY contract.

In any event, even assuming that PASNY had exclusive authority to decide whether given energy transmission terms available to it are reasonable,[13] the Commission order at issue here would in no way conflict with such authority, since, as discussed in Part 1 above, the Commission's order does not require PASNY to take, or refrain from taking, any action whatsoever. The only impact of the order upon PASNY is to give PASNY the option of transmitting additional power to Penn Yan over the lines of NYSEG.

B. *Applicability of Antitrust Policy*

Having determined that the Commission had jurisdiction to entertain Penn Yan's petition, we turn to the question whether the Commission's consideration of the possible anticompetitive nature of provisions of NYSEG's contract with PASNY was barred because of

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13 The provisions of the New York Power Authority Act, invoked by NYSEG, have no bearing on the Commission's jurisdiction in this case. While those provisions spell out PASNY's responsibilities under state law, *see* N.Y. Pub. Auth. Law (McKinney) § 1005, they do not, and indeed could not, limit the jurisdiction of the federal agency responsible for enforcing and administering the FPA. In the absence of persuasive proof, and NYSEG offers none, we cannot assume that Congress intended to replace the Commission's assessment of public interest, including its consideration of federal antitrust policies, with PASNY's assessment of public interest, made pursuant to its authority under New York state law.

PASNY's status as a subdivision of New York State. We conclude that the Commission was free to consider federal antitrust policy as an aspect of the public interest.

The purpose of the Commission's power to identify and remedy unreasonable provisions in utility contracts is "the protection of the public interest, as distinguished from the private interests of the utilities, [as] is evidenced by the recital in § 201 of the Act . . . ." *FPC v. Sierra Pacific Power Co., supra,* 350 U.S. at 355. The policies underlying federal antitrust law are one aspect of the public interest. Thus, the Commission's responsibility for protecting the public interest and its corresponding power to adjust unreasonable rates, etc., "carries with it the responsibility to consider, in appropriate circumstances, the anticompetitive effects of regulated aspects of interstate utility operations." *Gulf States Utilities Co. v. FPC, supra,* 411 U.S. at 758-59.

Nevertheless, it is evident that in certain circumstances a state will be immune from liability for its imposition of anticompetitive restraints. In *Parker v. Brown,* 317 U.S. 341 (1943), the Supreme Court held that federal antitrust laws do not prohibit a state, as sovereign, from imposing anticompetitive restraints "as an act of government." *Id.* at 352. Recent Supreme Court cases identify two criteria for application of *Parker* immunity: (1) "the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy' " and (2) "the policy must be 'actively supervised' by the State itself." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum Inc.,* 100 S. Ct. 937, 943 (1980), quoting *City of Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389 (1978) (opinion of

Brennan, J.). *See also New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978). Even assuming that appropriate circumstances might justify extension of this immunity to conduct by a private party, *cf. Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976);[14] *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), both of the prerequisites are lacking here.

To begin with, there is no articulation whatever of a state policy underlying the challenged provision of NS-11. The fact that a political subdivision of the state is a party to the contract does not transform the provisions of the contract into state policy. Moreover, even if the contract as a whole had been entered into by PASNY as agent of the sovereign in accordance with "clearly articulated and affirmatively expressed" state policy, there is no suggestion that the challenged restraint itself was mandated by, or even related to, state policy. The petition makes clear that the restrictive provision

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14 We cannot say that New York's regulation of utilities, pervasive though it may be, is sufficient to immunize regulated utilities from antitrust liability. In *Cantor v. Detroit Edison Co., supra*, the Court observed that state action immunity might reasonably be extended to private conduct where "a private citizen has done nothing more than obey the command of his state sovereign, [and] it would be unjust to conclude that he has thereby offended federal law," or where "the State is already regulating an area of the economy, [and] it is arguable that Congress did not intend to superimpose the antitrust laws as an additional, and perhaps conflicting, regulatory mechanism." 428 U.S. at 592. Nevertheless, the opinion noted that "[t]he Court has already decided that 'state authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity,'" *id.* at 592-93 (footnotes omitted), and pointed out that "[t]here is no logical inconsistency between requiring [a public utility] to meet regulatory criteria insofar as it is exercising its natural monopoly powers and also to comply with antitrust standards to the extent that it engages in business activity in competitive areas of the economy." *Id.* at 596. *Cf. Gulf States Utilities Co. v. FPC, supra*, 411 U.S. at 758-59; *Otter Tail Power Co. v. United States, supra*.

was desired by NYSEG, and there is no hint that it resulted from state policy. Even if the restrictive provision had been suggested by PASNY rather than NYSEG, the Commission would not be precluded from considering antitrust policy since "[i]t is not enough that . . . anticompetitive conduct is 'prompted' by the state action; rather, anticompetitive activities must be *compelled* by direction of the State acting as a sovereign." *Goldfarb v. Virginia State Bar, supra,* 421 U.S. at 791 (emphasis added). Thus we conclude that PASNY's status did not preclude the Commission from considering antitrust policy as one aspect of the public interest.

This conclusion, however, does not mean that summary disposition was appropriate. The Commission's determination as to the public interest under § 206 is normally required to be made "after a hearing." While no hearing is required when there are no material facts in issue, *Public Service Co. v. FERC,* 600 F.2d 944, 955 (D.C. Cir.), *cert. denied,* 444 U.S. 990 (1979); *Municipal Light Bds. v. FPC,* 450 F.2d 1341, 1345 (D.C. Cir. 1971), *cert. denied,* 405 U.S. 989 (1972); *Citizens for Allegan County Inc. v. FPC,* 414 F.2d 1125, 1128 (D.C. Cir. 1969), the limited record here reveals questions relating to the public interest which could best have been resolved after a hearing. It is true, as emphasized by the Commission, that NYSEG's petition admitted that it preferred not to provide transmission facilities to a competitor for transmission of power to one of NYSEG's present customers. But NYSEG's petition also alleged that the challenged contractual restraints were in the public interest as well, and there was no reason for the Commission to assume, as it did, that NYSEG's self-interest is inherently inconsistent with the public

interest. For example, in *Lafayette v. Louisiana Power & Light Co., supra,* the opinion of the Court discussed the impact on a public utility of loss of customers:[15]

> The elimination of customers in an established service area would likely reduce revenues, and possibly require abandonment or loss of existing equipment the effect of which would be to reduce its rate base and possibly affect its capital structure. The surviving customers and the investor-owners would bear the brunt of these consequences. The decision to displace existing service, rather than being made on the basis of efficiency in the distribution of services, may be made by the municipality in the interest of realizing maximum benefits to itself without regard to extraterritorial impact and regional efficiency.

435 U.S. at 404 (footnote omitted). Thus, questions as to the probable impact of the proposed modification on

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15 *Lafayette v. Louisiana Power & Light Co.* involved an antitrust suit brought by several Louisiana cities against an investor-owned utility (LP&L). LP&L counterclaimed, alleging various antitrust violations, including an illegal tying arrangement whereby one city contracted to provide gas and water service to LP&L electric customers outside city limits only on condition that the customers purchase electricity from the city rather than from LP&L. The municipalities moved for dismissal of the counterclaim on the ground that they were immune from antitrust liability. A majority of the Court held that in some circumstances, a municipality might be immune from liability as an agent of the state, but that no congressional intent to exempt local governments from federal antitrust laws could be inferred. Justice Brennan's analysis of the potential impact of eliminating customers from an established service area appears in Part I of his opinion, in which, joined by four other Justices, he concluded that practices designed to maximize benefits for the municipal constituencies may have an adverse impact upon the investor-owned utility and its customers and, accordingly, do not necessarily serve the national public interest.

NYSEG, the possibly inefficiency in duplicating service, the extent, if any, to which NYSEG might be entitled to a "settlement" similar to that contained in the 1962 agreement, etc., should have been considered in assessing the public interest. Both NYSEG and PASNY requested a hearing on Penn Yan's claims. We do not believe the Commission could properly decide those claims without a hearing.

C. *The Applicability of Sections 211 and 212*

Finally, we turn to NYSEG's claim that the Commission exceeded its authority because its order modifying NS-11 compels wheeling without complying with the statutory prerequisites of §§ 211 and 212 of the FPA. The Commission does not contend that an order requiring wheeling need not be preceded by the determinations envisioned by §§ 211 and 212. Rather, it contends that its order modifying NYSEG's contracts with PASNY and Penn Yan does not at all compel wheeling.

As the Commission views it, it is NS-11 which obligates NYSEG to wheel; the challenged provision of NS-11 limits Penn Yan's ability to resell the wheeled power to certain customers; and the Commission's order merely removes this restriction. Thus the Commission denies that the territorial limitations have any relationship to the volume of power NYSEG is required to wheel, stating that the only limitation on the amount of power Penn Yan may receive is imposed by its contract with PASNY, and that "Penn Yan's petition indicates that it has not yet reached its full capacity allocation." Most of these premises are disputed by NYSEG, which admits that it committed itself in NS-11 to wheel power to a limited extent, but contends that the Commission's

order expands NYSEG's voluntary commitment by eliminating any ceiling on the amount of wheeled power available to Penn Yan and utilities of other communities listed in the challenged provision of NS-11. NYSEG's position is that a valid purpose of defining its wheeling obligation in terms of the existing territories of the listed municipalities was to protect itself from undue volume demands on its transmission lines, a concern that is reflected also in Article IX of NS-11. The latter provision requires PASNY to notify NYSEG annually of its estimate as to the amount of power to be wheeled for the ensuing five years; NYSEG must respond as to whether or not it will be able to transmit these amounts and to state any "qualifications as to voltage, point of delivery or amount of delivery that attaches to any affirmative answer." NYSEG is thereupon obligated to wheel only in accordance with its affirmative answers, as qualified. Presumably the amount of power PASNY allots to Penn Yan will be affected by any limitations that NYSEG has placed on the amount it will wheel for PASNY with regard to Penn Yan. NYSEG stated its belief that in 1978 Penn Yan in fact exceeded its power entitlement under its PASNY contract. The implication is that the Commission's modification of NS-11 may well require NYSEG to wheel more power to Penn Yan than NYSEG deems prudent. Further, NYSEG points out that the Commission's order would permit any other community utility to make similar demands.

We agree that the effect of the Commission's order will be to increase beyond NYSEG's voluntary commitment the amount of power NYSEG is required to wheel. It is obvious that Penn Yan does not propose to furnish electricity to Excell homes by reducing the

amount furnished to the territory covered by the contracts. What Penn Yan seeks to sell to Excell, therefore, is not the presently wheeled power; it is an amount over and above the amount NYSEG is now wheeling, and the total power sought by Penn Yan may be, or may become, greater than the maximum amount of power that NYSEG has agreed to wheel. Thus, regardless of whether the primary purpose of the challenged paragraph of NS-11 was to limit the calls on NYSEG's lines or was to protect NYSEG from competitive raids on its other customers, the effect of the Commission's order is to expand NYSEG's commitment to wheel.

With this factual analysis, the legal question becomes whether FPA §§ 211 and 212 should be interpreted narrowly to apply only to a Commission order to wheel where no wheeling had previously been ordered or agreed to, or whether they should apply also to an order expanding a voluntary pre-existing commitment to wheel. While the statutory provisions, on their face, offer little guidance on this question, the purpose and history of the Commission's statutory powers to compel wheeling persuade us that §§ 211 and 212 apply to orders that would expand a voluntary commitment to wheel.

As originally enacted, the FPA did not permit the Commission to compel wheeling. Prior to its enactment, provisions were proposed which would have required "'every public utility to . . . transmit energy for any person upon reasonable request'" and would have "empowered the Federal Power Commission to order wheeling if it found such action to be 'necessary or desirable in the public interest.' H.R. 5423, 74th Cong., 1st Sess.; S. 1725, 74th Cong., 1st Sess. These

provisions were eliminated to preserve 'the voluntary action of the utilities.' S. Rep. No. 621, 74th Cong., 1st Sess., 19." *Otter Tail Power Co. v. United States,* 410 U.S. 366, 374 (1973). Congress thereby revealed its preference for reliance on "voluntary commercial relationships" rather than on "a pervasive regulatory scheme for controlling the interstate distribution of power." *Id.*[16]

In November 1978, however, the Public Utility Regulatory Policies Act, amending the FPA, granted the Commission certain additional powers, including the power to compel wheeling.[17] Under new FPA §§ 211 and 212, the Commission may require one electric utility to provide transmission services for another utility, provided certain substantive and procedural requirements are met. Section 211 states, in relevant part:

> Upon receipt of such application [by one utility for transmission services of another utility], after public notice and notice to each affected State regulatory authority, each affected electric utility, and each affected Federal power marketing agency, and after affording an opportunity for an evidentiary hearing, the Commission may issue such order if it finds that such order—

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16 The Act's reliance on voluntary commercial relationships was one factor that persuaded the Supreme Court that industries regulated under the FPA were not immunized from antitrust liability and that federal courts, to remedy antitrust violations, could order a utility to wheel power. *Id.*

17 Although these provisions became effective after Penn Yan's petition was filed, there does not seem to be any dispute that the Commission could use its new powers in deciding that petition.

(1) is in the public interest,

(2) would—

(A) conserve a significant amount of energy,

(B) significantly promote the efficient use of facilities and resources, or

(C) improve the reliability of any electric utility system to which the order applies, and

(3) meets the requirements of section 824k of this title.

16 U.S.C.A. § 824j(a). Section 211 further provides that no such order may be issued "unless the Commission determines that such order would reasonably preserve existing competitive relationships." 16 U.S.C.A. § 824j(c)(1).

In accordance with § 212,

> No order may be issued by the Commission under . . . subsection (a) or (b) of section 824j of this title unless the Commission determines that such order—
>
> (1) is not likely to result in a reasonably ascertainable uncompensated economic loss for any electric utility . . . affected by the order;
>
> (2) will not place an undue burden on an electric utility . . . affected by the order;
>
> (3) will not unreasonably impair the reliability of any electric utility affected by the order; and
>
> (4) will not impair the ability of any electric utility affected by the order to render adequate service to its customers.

> The determination under paragraph (1) shall be based upon a showing of the parties. The Commission shall have no authority under section . . . 824j of this title to compel the enlargement of generating facilities.

16 U.S.C.A. § 824k(a).

The new power to order wheeling was undoubtedly intended, at least in part, to serve as a tool for enhancing competition by facilitating bulk purchases of power. *See* H.R. Rep. No. 95-496 (IV), 95th Cong. 1st Sess. 151 (1977) *reprinted in* [1978] *U.S. Code Cong. & Ad. News* 8454, 8593-94; S.Rep. No. 95-442, 95th Cong. 1st Sess. 32 (1977) *reprinted in* [1978] *U.S. Code Cong. & Ad. News* 7903, 7929. On the other hand, in contrast to determinations under § 206 which focus on public, not private, interest,[18] it is clear from the express requirements of §§ 211 and 212 that the public interest and the enhancement of competition are not alone sufficient justification for compelling wheeling. Findings under § 211 must assess the impact of such an order on specific aspects of private interests as well: the Commission must find that the order is not likely to cause the transmitting utility to suffer an uncompensated economic loss or other undue burden; the Commission must find that the applicant for transmission services has demonstrated that he is ready, willing, and able to pay the reasonable costs of transmission services plus a reasonable rate of return on such costs; and the Commission must find that the wheeling order would reasonably preserve existing competitive rela-

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[18] For example, a contract rate cannot be held unreasonable under § 206(a) solely because it yields less than a fair return on invested capital. *See FPC v. Sierra Pacific Power Co., supra,* 350 U.S. at 355.

tionships. *Cf.* H.R. Rep. No. 95-496 (IV), *supra* at 152, [1978] *U.S. Code Cong. & Ad. News* at 8595 (emphasizing "statutory safeguards plus judicial scrutiny" to insure fair treatment and full compensation). Finally, even when all prerequisites for the issuance of an order compelling wheeling have been met, the Commission is instructed to issue a *proposed* order, so as to allow the parties themselves an opportunity to agree on terms and conditions. § 212(c)(1), 16 U.S.C.A. § 824k(c)(1).[19]

These requirements reflect an intent to safeguard the voluntariness of wheeling arrangements to the greatest extent possible while providing "assurance to all persons that they will be treated fairly and compensated fully" if they are compelled to provide involuntary services. H.R. Rep. No. 95-496 (IV), *supra,* at 152, [1978] *U.S. Code Cong. & Ad. News* at 8595. The narrow interpretation of § 211 urged by the Commission to exclude its modification of NS-11 from the ambit of § 211 would, in our view, be inconsistent with Congress' intent.

This conclusion does not suggest that we would view the Commission's modification of the NYSEG-Penn Yan contract, by itself, as an order to wheel. Simple elimination of Penn Yan's undertaking not to contract with PASNY for energy beyond the needs of customers within the Village's 1961 territorial limits, would

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19 Section 212(c)(1) provides, in part:

> Before issuing an order under . . . subsection (a) or (b) of section 824j of this title, the Commission shall issue a proposed order and set a reasonable time for parties to the proposed . . . transmission order to agree to terms and conditions under which such order is to be carried out, including the apportionment of costs between them and the compensation or reimbursement reasonably due to any of them.

appear to do no more than permit Penn Yan to expand its wholesale purchase contract with PASNY; this, without the ordered modification of NS-11, would not compel wheeling. Nor do we suggest that the Commission is powerless to review a wheeling agreement under § 206 without following the requirements of §§ 211 and 212. If, after a hearing as required by § 206, the Commission determines that a particular rate, charge, or condition is unreasonable, it can order a modification. But where, as here, the modification amounts to an order requiring wheeling, it must be preceded also by determinations in accordance with §§ 211 and 212. Simply put, we will not allow the Commission to do indirectly without compliance with the statutory prerequisites, what it could not do directly without such compliance. *Cf. Richmond Power & Light v. FERC*, 574 F.2d 610, 620 (D.C. Cir. 1978).

For the foregoing reasons, we affirm so much of the Commission's orders as required the filing of the contracts, and we vacate so much of the orders as modified the contracts, and remand for proceedings not inconsistent with this opinion.

GOETTEL, *District Judge* (concurring and dissenting):

While I do not disagree with the analysis of the law in the comprehensive opinion of the Court, I dissent from the conclusion in Part II-C that the modification of the contract NS-11 by the Commission amounts to the requiring of wheeling, thereby necessitating compliance with the statutory prerequisites of §§ 211 and 212 of the FPA. My contrary conclusion is restricted to the facts of this case, which show the minimal effect of

the modification on the amount of power being wheeled.

A respectable argument can be made that the Commission's modification does not compel wheeling at all. NYSEG agreed with PASNY in 1961 (in NS-11), to wheel PASNY power to municipalities, including the Village of Penn Yan, in exchange for benefits to be received by NYSEG. In 1962, NYSEG, in exchange for $95,910.48, released Penn Yan from its 1956 agreement to purchase power from NYSEG, enabling Penn Yan to purchase its power from PASNY and have that power transmitted over NYSEG lines under the 1961 NYSEG-PASNY contract. In accordance with the 1962 agreement between NYSEG and Penn Yan, NYSEG wheels the power to the Village, which then transmits it to its customers. Thus, the addition of the Excell Estates customers does not involve any additional transmission by NYSEG in terms of distance. The Commission found that the territorial restriction removed by the modification served to limit only the use rather than the amount of power. Consequently, the modification did not augment NYSEG's wheeling obligation and thus was not, *per se,* a wheeling order.[1]

As a practical matter, of course, increasing the permissible uses of the power Penn Yan receives over NYSEG lines could have the effect of increasing the amount of that power. Realistically, if the Village of Penn Yan were merging with another village of equal size, the effect would be to double immediately the amount of power to be wheeled. If that were the case

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1 All of the existing authorities concerning the inability of the Commission to compel wheeling seem to deal with cases in which there was no pre-existing wheeling agreement.

' ere, it would be hard to argue with the position of the Court. But Excell Estates is composed of only twenty-seven houses. The additional power NYSEG is required to wheel to Penn Yan for those additional twenty-seven houses, in the context of other variables affecting the amount of power to be wheeled, is *de minimis*.

When NYSEG agreed to wheel PASNY power to Penn Yan, it had no assurance that the Village would not grow in population or consumption of electric power. Within the old territorial limits, the number of customers could have increased, moderately or even drastically. In fact, it did not. According to official United States census figures,[2] the population of Penn Yan *declined* between 1960 and 1970, despite the annexation of Excell Estates. On the other hand, even though its population declined, Penn Yan's consumption of electric power, like that of the nation as a whole,[3] probably increased substantially. Given these facts, I view the addition of Excell Estates (constituting between one percent and two percent of the population of the Village of Penn Yan) as having a *de minimis* effect on the amount of power wheeled to Penn Yan. Consequently, I would not require the Commission to comply with §§ 211 and 212 of the FPA before modifying the wheeling agreement to allow that effect.

The same considerations apply in part to the decision of the Court requiring a hearing pursuant to § 206 of

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2 U.S. Dep't of Commerce, 1970 Census Population, Vol. 34, § 1, at 34-14.

3 Between 1960, the year before the agreement at issue, and 1978, when the current dispute arose, average per capita energy consumption in the United States increased approximately fifty percent. U.S. Dep't of Commerce, Bureau of the Census, *Statistical Abstract of the United States* 602 (100th ed. 1979).

the FPA. However, PASNY has requested such a hearing, and the precedential effect of striking the territorial limitation for all of the villages covered by the original 1961 contract[4] is involved. (Some of those villages may have had material changes in their geographical boundaries.) Consequently, there is more reason for requiring such a hearing than there is for requiring the Commission to comply with §§ 211 and 212 before deciding whether NYSEG should assist in servicing an additional twenty-seven customers in the Village of Penn Yan.

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4 The villages covered are Bath, Castile, Endicott, Greene, Groton, Marathon, Penn Yan, Silver Springs, and Watkins Glen; in addition, the contract covers Chautauqua-Cattaraugus Electric Cooperative and Steuben Rural Electric Cooperative.

APPENDIX C

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 19th day of February, one thousand nine hundred and eighty-one.

79-4185

NEW YORK STATE ELECTRIC and GAS CORPORATION, *Petitioner,*

v.

FEDERAL ENERGY REGULATORY COMMISSION, *Respondent*

VILLAGE OF PENN YAN, NEW YORK, MUNICIPAL ELECTRIC UTILITIES ASSOCIATION OF NEW YORK STATE, *Intervenors.*

(February 19, 1981)

Petitions for rehearing containing suggestions that the action be reheard in banc having been filed herein by counsel for the respondent, Federal Energy Regulatory Commission and counsel for the intervenor, Village of Penn Yan, New York,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petitions for rehearing are DENIED, Judge Goettel dissenting.

It is further noted that the suggestions for rehearing in banc have been transmitted to the judges of the court in regular active service and to any other judge on the panel that

heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ A. DANIEL FUSARO
A. Daniel Fusaro
Clerk

APPENDIX D

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners:
CHARLES B. CURTIS, *Chairman;*
DON S. SMITH, GEORGIANA SHELDON,
MATTHEW HOLDEN, JR., AND GEORGE R. HALL.

Docket No. EL78-29

Village of Penn Yan, New York

Declaratory Order Modifying Jurisdictional Contracts (A143-A152) (Issued March 28, 1979)

Before the Commission is a petition seeking invalidation of certain contractual provisions contained in agreements providing for the wheeling of power by New York State Electric and Gas Corporation (NYSEG) from the Power Authority of the State of New York (PASNY) to a municipal customer, the Village of Penn Yan, New York (Penn Yan or Village). The issue is whether contractual provisions which limit Penn Yan's use of power wheeled by NYSEG for retail service within its borders as of the date of the wheeling contract (February 10, 1961) are just and reasonable. On the basis of the undisputed facts presented in the pleadings, we find that these limitations on wheeling service are unjust and unreasonable because they are unreasonably anticompetitive in effect. Accordingly, we find that the provisions are not part of the approved rate schedule in the 1962 Agreement and are therefore unenforceable.

Procedural History

On May 25, 1978, Penn Yan filed a petition for a declaratory order pursuant to Section 1.7(c) of the Commission's Rules of Practice and Procedure.[1] In its petition, Penn

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[1] Notice of Penn Yan's petition was issued on June 13, 1978, with protests or petitions to intervene due on or before June 30, 1978.

Yan requests the Commission to invalidate provisions of the contract between PASNY and NYSEG dated February 10, 1961, designated Niagara Contract NS-11 (NS-11 Contract).

Protests and Petitions to Intervene were filed by NYSEG and PASNY on July 21, 1978,[2] raising a variety of arguments against modification of the NS-11 contract which will be dealt with below. Penn Yan filed a reply to the NYSEG and PASNY petitions on August 8, 1978. In addition, Penn Yan filed a Motion To Compel Filing of the 1962 NYSEG-Penn Yan wheeling agreement (1962 Agreement) with this Commission. Both PASNY and Penn Yan filed objections to the Motion To Compel raising jurisdictional arguments that will be discussed herein.

Discussion

Before turning to the merits of the issues raised by the parties' pleadings, we will respond to the jurisdictional objections raised by PASNY and NYSEG.

The provision which places restrictions on power wheeled by NYSEG is found in two contracts. The first, a contract between PASNY and NYSEG, provides for, *inter alia,* the transmission by NYSEG of Niagara Project power to certain PASNY customers including Penn Yan. The offending Contract NS-11 provision is Article X, Paragraph 3, which reads as follows:

> The electric power and energy to be delivered by Contractor [NYSEG] to Authority for customers from the system of Contractor *will be limited to such electric power and energy as is necessary for the use, distribution and resale within the area limits served as of the date hereof* by the Village of Bath, Castile, Endicott, Greene, Groton, Marathon, Penn Yan, Silver Springs and Watkins Glen,

[2] On June 26, 1978, NYSEG requested an extension to file its protest and petition to intervene and such extension was granted until July 21, 1978.

> Chautaugua-Cattaraugus Electric Cooperative, Inc., and Steuben Rural Electric Cooperative, Inc. and for such other loads and customers of Authority as may be mutually agreed upon from time to time. (emphasis added).

The second contract to be considered, the NYSEG-Penn Yan agreement, terminated a 1956 agreement under which Penn Yan purchased its electrical energy requirements from NYSEG and provided for NYSEG to wheel PASNY power to Penn Yan. It contains language which parallels the language in Article X:

> The Customer (NYSEG) and the Village may contract with the Authority for the supply of Customer's electrical energy requirements. *Customer will take from the Authority under such contract only such electric energy required by the Village within the territorial limits, as of February 10, 1961, of the Village and its franchise area outside the Village as approved by the Public Service Commission of the State of New York, (a) for its own use, and (b) for distribution and resale to its existing and future customers.* Electric energy purchased by the Customer from the Authority and delivered to the Customer by the Corporation pursuant to its agreement with the Authority shall be delivered at 34,500 volts at a point in the Village on the Corporation's 34,500 volt circuit at the Corporation's presently existing substation, known as the St. John's Substation. Relaying shall be coordinated as mutually agreed. (emphasis added)

Both NYSEG and PASNY challenge the Commission's jurisdiction over the 1962 Agreement. According to NYSEG, that agreement need not be filed with the Commission because: 1) both the 1956 and 1962 Agreements were executed prior to judicial determination that this Commission had jurisdiction over state-regulated sales of wholesale power in *F.P.C.* v. *Southern California Edison Co.*, 376 U.S. 205 (1964); and 2) only *notice* of termination need be filed under Section 35.15 of the Rules and Regulations, not the 1962 Agreement itself.

PASNY argues, essentially, that it is not *its* contract with NYSEG that is preventing Penn Yan from serving the additional customers. The problem lies, PASNY argues, with NYSEG's 1962 agreement with Penn Yan. According to PANSY, [sic] the 1962 Agreement is properly jurisdictional before the New York State Public Service Commission.[3]

Although Penn Yan states that the NS-11 contract is on file with the Commission and no party disputes that representation, we note that this contract *has not* been filed with the Commission. We find, that to the extent they provide for NYSEG's transmission of power to PASNY's municipal customers, both the NS-11 contract and the 1962 Agreement are subject to the jurisdiction of this Commission.

Under Section 201(b) of the Federal Power Act, a jurisdictional utility is one which sells or transmits electric energy at wholesale in interstate commerce. Therefore the 1962 Agreement and the provision of the NS-11 contract which provide for NYSEG transmission of PASNY power at wholesale to Penn Yan are contracts subject to our jurisdiction. While PASNY is exempt from our jurisdiction as a public authority under Section 201(f), NYSEG is a jurisdictional utility and must file these contracts under Section 205(c). Section 205(c) of the Act requires that all such contracts be filed with the Commission. Accordingly, we will direct NYSEG to filed [sic] the NS-11 Contract and the 1962 Agreement with this Commission pursuant to Sections 201(b) and 205(c) of the Act and Section 35.1 of our Rules and Regulations.[4]

[3] In May 1978, Penn Yan filed a complaint with the New York Public Service Commission. "Complaint and Request For Declaratory Ruling by the Village of Penn Yan, New York Requesting Investigation and Invalidation of Contract Provision between Village of Penn Yan and New York State Electric and Gas Company, pursuant to Sections 66, 68, 71 and 72 of the Public Service Law of the State of New York." As of the date of the issuance of this order the the [sic] NYPSC has taken no action on the complaint.

[4] The Commission considered and interpreted a similar contract in *Niagara Mohawk Power Corporation*, ER76-523 (July 21, 1976). (Footnote continued on next page.)

Having established this Commission's authority to review the reasonableness of the contracts in question, we turn to the specific contractual provisions at issue. On the basis of the undisputed facts presented in the pleadings, the relevant case law and public policy considerations we find that these limitations on wheeling service are unjust and unreasonable because they are anticompetitive with no public interest justification.

It is well-established that this Commission must consider antitrust policy in exercising its broad regulatory authority. As stated by the Supreme Court, ". . . [t]he history of Part II of the Federal Power Act indicates an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest." *Otter Tail Power Co.* v. *United States,* 410 U.S. 366, 374-5 (1973). See also *Gulf States Utilities Co.* v. *F.P.C.,* 411 U.S. 747, 760-62 (1973). Thus, the Courts have recognized that regulation and competition can act as complementary forces in promoting economic and efficient electric service.

Recent Commission orders further define our responsibility to consider antitrust policy when examining the rates, terms and conditions of agreements for wholesale service.

In an order approving settlement in *Gulf States Utilities Company,*[3] this Commission reviewed a proposed tariff provision which restricted wholesale purchasers from reselling electric power and energy except at the retail level. In the order we

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(Footnote 4 continued from previous page.)
In that order we examined a Niagara Mohawk-PASNY Contract which provided, *inter alia,* for the transmission by Niagara Mohawk of power from PASNY's Fitzpatrick Nuclear Plant to PASNY priority customers. We held that Niagara-Mohawk's obligation to wheel to priority customers extended to both *present and future* priority customers. We note that PASNY did not challenge the Commission's assertion of jurisdiction over those portions of the contract providing for transmission by Niagara Mohawk. PASNY raises no such objections here with respect to the NS-11 contract.

[3] "Order Approving Settlement Subject to Condition," Docket No. ER76-816 (October 20, 1978).

established a *per se* rule against direct resale prohibitions, finding such provisions to be unduly restrictive and anticompetitive. *See also Empire District Electric Company.*[6] In reviewing the reasonableness of the contracts before us, then, we must consider the anticompetitive effect of the provisions at issue.

In its petition, Penn Yan argues that the disputed provisions violate the public policy of the State of New York, and the United States, including the policies expressed in the antitrust laws. The contract provisions at issue, the Village argues, are unlawful as horizontal territorial allocation schemes. Further, Penn Yan points out that the anticompetitive effect of the territorial restrictions in the contracts is similar to that of the effect of resale restrictions found unlawful in the Commission's order in *Gulf States, supra.* We agree with Penn Yan. The two contractual provisions at issue restrict the *use* to which Penn Yan can put electric power wheeled to it by NYSEG from PASNY's Niagara Project. Under the previously cited provisions of both the NS-11 and 1962 Agreement, Penn Yan's use of the wheeled power is limited to service of customers within its 1961 boundaries. However, there is no limitation in the *amount of power* NYSEG will wheel.[7] For example, when Penn Yan's retail load increases due to an increase in population *within* its 1961 borders, NYSEG will be obligated to wheel additional power under the two contracts at issue. It is only when Penn Yan attempts to utilize wheeled PASNY power to serve outside those boundaries that the restriction comes into play. The

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[6] "Order Conditionally Accepting Proposed Rate Schedules for Filing and Granting Intervention", Docket No. ER78-511 (October 27, 1978) (directing utility to strike resale prohibition under *Gulf States per se* rule).

[7] The only limitation on the *amount* of power Penn Yan can receive under this agreement is imposed by its contractual allocation from *PASNY* which is provided for in the PASNY-Penn Yan Niagara Contract NS-28. In its petition, Penn Yan indicates that it has not yet reached its full capacity allocation.

effect of those provisions, then, is to protect NYSEG from competition for retail customers and to restrict Penn Yan's ability to extend its municipal system, thereby impairing and diminishing competition to serve retail customers in the extended territories.[8]

In terms of anticompetitive effect, this territorial restriction on the use of PASNY power is as onerous as a restriction on the use of power which prohibits resale to any but retail customers.[9] As stated above, such direct resale prohibitions have been found *per se* unlawful in *Gulf States, supra*. There the Commission stated:

> This gives Gulf States the power to eliminate or inhibit its bulk power customers as potential competitors of Gulf States for further wholesaling of power and energy purchased under the respective rate schedules . . . We do not find in the regulatory scheme under the Federal Power Act any public policy basis for allowing public utilities to employ tariff provisions to foreclose wholesale competition between a supplier like Gulf States and its bulk power purchasers.[10]

Similarly, here we find no public policy to uphold provisions in service agreements which work to eliminate or inhibit com-

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[8] Although it does not affect a large group of customers under the facts of this case, competition among utilities at the edges of their service territories does serve an important purpose. This form of competition can provide an incentive for the present holder of a distribution franchise to operate its system efficiently so as to keep costs low and continue to serve in the fringe areas.

[9] NYSEG's exercise of control in this situation can be characterized as greater in degree than that exercised by bulk power suppliers who attempt to impose direct resale prohibitions. In the latter case, the bulk power suppliers attempt to limit the use of power *they supplied* to wholesale customers. Here, NYSEG extends the restriction further by attempting to limit the use of power supplied to Penn Yan from *another utility*.

[10] *Gulf States, supra* at pages 5-6.

petition for retail customers between a wheeling agent like NYSEG and its wheeling customers.

In this connection, we recognize that electric utilities may serve legitimate purposes in scheduling the amount of power they will wheel to a wheeling customer. For example, their concerns might be to ensure sufficient time to modify transmission facilities to serve the changing needs of their customers. However, we need not reach the question of the appropriate device for serving those interests here. These contractual provisions can only be characterized as limitations on the *use* of power, were included for the benefit of NYSEG, and are irrelevant to any valid concern of NYSEG regarding the capability of its transmission system.

NYSEG's own admissions indicate that these provisions were included for the express purpose of of [sic] eliminating Penn Yan as a potential competitor in area [sic] which Penn Yan has annexed to its municipal borders. In their Protest and Petition to Intervene NYSEG states:

> NYSEG has declined to further modify its transmission obligation under NS-11 Paragraph 3 relative to transmission service for the Excell Estates area of Penn Yan because, . . . [sic] in the exercise of *sound business judgment,* NYSEG has determined that it would not be in the public or *its corporate interest* to offer its transmission services as now requested by Penn Yan when the result would be an unwarranted duplication of electric service in Excell Estates.[11] (emphasis added)

Later, in the same petition, NYSEG states:

> The relief requested by Penn Yan, if granted, would only result in the Commission compelling NYSEG to "wheel"

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[11] We note that the question of whether Penn Yan's retail service to the residents of Excell Estates would result in "unwarranted duplication of electric service to Excell Estates" need not be reached here. We have merely determined that a restrictive provision in NYSEG's wholesale transmission agreement is unreasonable and therefore unenforceable and leave the question of which entity should serve the retail customers in Excell Estates to the New York State Public Service Commission.

power involuntarily *for a direct competitor* in violation of NYSEG's rights and the public interest attendant upon the avoidance of an unwarranted duplication of electric service, thus abrogating contract provisions of Niagara Contract NS-11 between NYSEG and PASNY. (emphasis added)[12]

Finally, we note that NYSEG's repeated assertions that the Commission's modification of these provisions would result in an "order compelling wheeling" are unfounded. By entering into the two contracts at issue, NYSEG, has already undertaken an obligation to wheel power to Penn Yan. By eliminating the restrictive provisions, we are eliminating the restrictions on the use of wheeled power rather than "compelling wheeling."

We find, therefore, that these restrictive provisions are anticompetitive and serve no countervailing public interest objectives. Accordingly, they will be unenforceable.[13]

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[12] In addition, communications between Penn Yan and NYSEG reveal a similar intent on NYSEG's part to protect itself from competition. In response to Penn Yan's letter request for modification of the 1962 Agreement NYSEG responded:

> Paragraph 3 of that Agreement was specifically designed to preserve the territorial integrity of the Company's franchise area as of February 10, 1961. Letters from NYSEG dated October 30, 1970 and March 14, 1978, Exhibit C to Penn Yan Petition for Declaratory Order.

[13] We note that the restrictive provision in the NS-11 contract between NYSEG and PASNY applies to NYSEG's wheeling arrangements with the following PASNY customers: Bath, Castile, Endicott, Greene, Groton, Marathon, Penn Yan, Silver Springs, Watkins Glen, Chautaugua-Cattaraugus Electric Cooperative, and Steuben Rural Electric Cooperative. Any individual wheeling contracts which NYSEG has entered into with these municipalities should be on file with this Commission under Section 201(b) and Section 205(c). To the extent that such contracts have not been filed, we will direct NYSEG to do so now.

The Commission orders:

(A) Penn Yan's Petition for a Declaratory Order to Invalidate Contract Provision Between the Power Authority of the State of New York and New York State Electric and Gas Corporation is hereby granted.

(B) Penn Yan's Motion to Compel Filing of the 1962 Agreement between NYSEG and Penn Yan is hereby granted.

(C) Within thirty days of the date of issuance of this order, the New York State Gas and Electric Company shall file its 1962 Agreement with Penn Yan and any other contracts in which NYSEG has agreed to provide similar transmission services to other customers. In all such contracts, the provisions which impose a limitation on the availability of wheeling service as discussed in the text of this order will not be considered part of the approved rate schedule and are therefore, unenforceable.

(D) Within thirty days of the date of issuance of this order, NYSEG shall file its Contract NS-11. That portion which places limitations on the availability of wheeling service to Penn Yan is rendered unenforceable.

(E) The Secretary shall cause prompt publication of this order to be made in the Federal Register.

By the Commission.

(SEAL)

KENNETH F. PLUMB,
Secretary.

APPENDIX E

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners:
CHARLES B. CURTIS, *Chairman;*
GEORGIANA SHELDON, AND GEORGE R. HALL.

Docket No. EL78-29

Village of Penn Yan, New York

Order Denying Rehearing (A183-A191)

(Issued September 17, 1979)

Introduction

On March 28, 1979, the Commission issued a "Declaratory Order Modifying Jurisdictional Contracts." In that order, the Commission ordered New York State Electric and Gas Corporation (NYSEG) to file certain contracts relating to NYSEG's agreement to transmit Niagara Project power to certain preference customers of the Power Authority of the State of New York (PASNY), including the Village of Penn Yan (Penn Yan).[1] In addition, the Commission determined that provisions in these contracts which limit a municipal's use of power wheeled by NYSEG to retail service within the the [sic] municipal's borders as of the date of the contract are unjust and unreasonable because they are unreasonably anticompetitive in effect.

On April 25, 1979, NYSEG filed an application for rehearing of the declaratory order and requested the Commission to vacate the order in its entirety.[2]

[1] The PASNY - NYSEG transmission agreement is designated Niagara Contract NS-11 and is refered [sic] to herein as NS-11.

The NYSEG - Penn Yan transmission agreement, recognizing the NYSEG's transmission obligation as established in NS-11, is referred to herein as the 1962 Agreement.

[2] On May 3, 1979, the Village of Penn Yan filed a response to NYSEG's application for rehearing. While responses to rehearing (Footnote continued on next page.)

We find, on careful consideration of NYSEG's application, no factual or legal issues which have not been previously addressed or which would warrant modification of the March 28 order. Accordingly, we shall deny rehearing.

Discussion

1. Jurisdiction

In its application, NYSEG reiterates its claim that the PASNY/NYSEG NS-11 Contract and the NYSEG/Penn Yan 1962 Agreement are not subject to the jurisdiction of the Commission. This claim warrants little response. We need simply state that under Section 201(b) of the Federal Power Act, NYSEG is a jurisdictional utility. Its transmission contracts with PASNY and the preference customers of PASNY are jurisdictional agreements which must be filed under Section 205(c) of the Federal Power Act and Section 35.1 of our Rules of Practice and Procedure.[3]

(Footnote 2 continued from previous page.)
applications ordinarily do not lie, we believe that Penn Yan's pleading will aid the Commission in its consideration of the issues raised by NYSEG and shall therefore consider Penn Yan's response.

[3] NYSEG also challenges the Commission's requirement that the 1962 Agreement be filed on the ground that this filing order was based on the Commission's consideration of Penn Yan's Motion to Compel Filing. Such a motion would not lie under Section 1.12(a) of the Commission's Rules of Practice and Procedure, NYSEG argues, because no hearing has been ordered in this docket and the motion requested relief not contemplated in that section. As with many of the arguments made by NYSEG in its application, such an argument improperly elevates form over substance. Regardless of whether Penn Yan properly captioned its request as a "motion," the Commission has ample authority under Section 205(c) of the Act and Section 35.1 of the Rules of Practice and Procedure to require a jurisdictional utility to file jurisdictional transmission agreements. This authority may be exercised pursuant to a complaint under Section 1.6(a) filed at any time by "any person complaining of anything done or omitted to be done by any . . . public utility" or by the Commission acting *sua sponte*.

2. Need for Hearing

In its application, NYSEG argues that the Commission erred in determining that the territorial restrictions contained in Contract NS-11 and the related transmission contracts between NYSEG and the individual PASNY customers were unenforceable, without an evidentiary hearing. In support of this position, NYSEG argues that, because the Commission's order compels wheeling, the statutory requirements of Sections 211 and 212 of the Federal Power Act [4] and general principles of due process require that an evidentiary hearing be held.

NYSEG's arguments regarding the requirements of Sections 211 and 212 are totally inapposite. As stated in the declaratory order:

> Finally, we note that NYSEG's repeated assertions that the Commission's modifications of these provisions would result in an "order compelling wheeling" are unfounded. By entering into the two contracts at issue, NYSEG, has already undertaken an obligation to wheel power to Penn Yan. By eliminating the restrictive provisions, we are eliminating the restrictions on the use of wheeled power rather than "compelling wheeling." (Order at 8).

Contrary to NYSEG's assertion that Commission's order results in "unlimited availability of NYSEG's transmission facilities," the order merely removes an anticompetitive restriction on NYSEG's *existing* wheeling obligation. Since the order does not *create* a wheeling obligation, the hearing, findings and determinations under Sections 211 and 212 were not necessary for our determination.

Even if the specific requirements of Sections 211 and 212 need not have been met in this case, NYSEG argues that the Commission's action in rendering the disputed provisions

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[4] 16 U.S.C. §824j and k, as added by the Public Utility Regulatory Policies Act of 1978 (Pub. L. 95-617, Title II, §§203 and 204(a), 92 Stat. 3136 and 3138 enacted November 9, 1978).

unenforceable without an evidentiary hearing was an abuse of discretion. Again, NYSEG's argument must be rejected.

It is well-established that the Commission need not hold a hearing where it is present [sic] with questions of law only and no factual issue is in dispute. In *Citizens for Allegan County* v. *FPC,* [5] the court held:

> . . . the right of opportunity for hearing does not require a procedure that will be empty sound and show, signifying nothing. The precedents establish, for example, that no evidentiary hearing is required where there is no dispute on the facts and the agency proceeding involves only a question of law. [footnote ommitted.] [sic]

Similarly, in *Municipal Light Boards of Reading and Wakefield* v. *FPC,*[6] the court held:

> There are occasions when an agency may dispose of a controversy on the pleadings without an evidentiary hearing when the opposing presentations reveal that no dispute of fact is involved, but only a question of law or administrative policy of such a nature that there is neither a dispute as to material facts nor a need to ventilate the underlying facts to aid in policy determination.[7]

Here, the Commission was presented with the question of whether the territorial limitations on wheeling service were just and reasonable. The resolution of that issue was dependent on the Commission's determination that 1) the disputed provision is anticompetitive in effect and 2) no countervailing public interest objective justifies upholding such a provision.[8]

[5] 414 F.2d 1125, 1128 (D.C. Cir. 1969).

[6] 450 F.2d 1341, 1345 (D.C. Cir. 1971), *cert. denied,* 405 U.S. 989 (1972).

[7] *Accord,* Virginia Electric and Power Company, 351 F.2d 408, 410 (4th Cir. 1965); Pennsylvania Gas and Water Co. v. FPC, 463 F.2d 1242, 1251 (D.C. Cir. 1972); Independent Bankers Association of Georgia v. Board of Governors of the Federal Reserve System, 516 F.2d 1206, 1220 (D.C. Cir. 1975).

[8] Had a legitimate objective been raised in support of the provision, the Commission would have made a third inquiry - viz, (Footnote continued on next page.)

In this case each of these questions could be resolved on the basis of the undisputed facts contained in the pleadings.

First, no party disputes the anticompetitive effect of the provision - i.e., to restrict Penn Yan's ability to extend its municipal system, thereby impairing and diminishing competition to serve retail customers in the extended territories. On the question of NYSEG's objective in including such a provision in its transmission agreements, the pleadings are clear.[9] As stated in the declaratory order, NYSEG's Protest and Petition to Intervene described its reasons for including the provision as protection of its "corporate interest" and to avoid wheeling power "involuntarily for a direct competitor."

Thus, the pleadings and the contracts themselves provide a sufficient factual basis for the Commission's finding that the disputed provision is anticompetitive in effect and serves no countervailing public interest objective. Since no material facts were in dispute a hearing would simply have been the occasion for "empty sound and show, signifying nothing." *Citizens for Allegan County, supra.* All issues were fully briefed and a hearing was not necessary to protect the rights of the parties and would have been an uneconomical use of the Commission's resources.[10]

(Footnote 8 continued from previous page.)
whether alternative means of less anticompetitive effect exist which would accomplish the objective. Here, since NYSEG's stated objective was to protect itself from competition, no countervailing public interest objective existed in this case. The question of alternative means did not, therefore, have to be addressed.

[9] While NYSEG claims that it has not had an opportunity to fully brief the question of possible objectives to be served by the disputed provision, it should be noted that even in its application for rehearing the Company failed to offer any other alternative objectives.

[10] NYSEG also claims that its opportunity to be heard in this proceeding has been limited by the Commission's failure to grant NYSEG's petition to intervene. While NYSEG's petition to intervene should have been granted in the declaratory order and was inadvertently omitted, no prejudice will result from granting the
(Footnote continued on next page.)

3. The Effect of State Approval of Contract NS-11

Because NS-11 has been approved by the State of New York, NYSEG argues that 1) the Commission is without authority to modify its terms, and 2) its provisions, even if anticompetitive, are immune from the Federal antitrust laws by virtue of state action. Both arguments are totally without merit. Before addressing these arguments, however, it is necessary to briefly examine the nature of "state approval" of PASNY contracts such as NS-11.

PASNY is a public benefit corporation of the State of New York. Exercising powers delegated by the state, PASNY finances, builds and operates electric generation and transmission facilities for purposes specified by the Legislature and Governor of New York.[11] Under the Public Authorities Law, contracts for the sale, transmission and distribution of power from PASNY projects are negotiated by representatives of the Authority, publicly noticed, approved by the trustees of PASNY and finally, approved by the Governor of New York.[12] Such approval, however, in no way limits this Commission's authority to regulate jurisdictional utilities who may contract with PASNY or to regulate PASNY, as a licensee, where it is contracting to transmit power from projects licensed by this Commission.

In arguing that state approval renders the Commission powerless to modify the provisions of NS-11, NYSEG argues that the Niagara Redevelopment Act[13] expresses the intent of Congress to give the state sole jurisdiction over the terms and conditions of sale and transmission of Niagara Project power.

(Footnote 10 continued from previous page.)
company's petition in this order. NYSEG had responded to all pleadings submitted by Penn Yan and such pleadings have been considered in determining appropriate Commission action.

[11] *See* §1005 of the Pub. Auth. L. of New York.

[12] *See* §1009 of the Pub. Auth. L. of New York.

[13] 16 U.S.C. §836 (Pub. L. 85-159; 71 Stat. 401, enacted August 21, 1957).

An examination of the Niagara Redevelopment Act, however, indicates that the approval of the Governor of the State of New York was contemplated in a specific area involving the marketing of project power.[14] Such approval was to be given in accordance with the procedures of New York state law as discussed above. There is absolutely no language in the Act which supports the proposition that the Act expresses the intent of Congress to prevent the Commission from exercising its authority under Part II to, *inter alia,* determine the justness and reasonableness of the terms and conditions of jurisdictional transmission agreements.[15] In addition, Section 1(b)(4) of the Act, cited by NYSEG as support for its argument, places an affirmative obligation on PASNY to provide transmission service to its preference customers, either by purchasing such service under reasonable conditions or constructing the necessary transmission lines. If anything, this language lends support to the Commission's action on the territorial restriction in the contracts at issue. In sum, the Niagara Development [sic] Act does not affect, in any way, the Commission's authority to modify the contracts at issue.

---

[14] §836(b)(3) provides in pertinent part: (3) The licensee shall contract, with the approval of the Governor of the State of New York, pursuant to the procedure established by New York law, to sell the licensee of Federal Power Commission project 16 for period ending not later than the final maturity date of the bonds initially issued to finance the project works herein specifically authorized, four hundred and forty-five thousand kilowatts of the remaining project power, which is equivalent to the amount produced by project 16 prior to June 7, 1956, for resale generally to the industries which purchased power produced by project 16 prior to such date, or their successors, in order as nearly as possible to restore low power costs to such industries and for the same general purposes for which power from project 16 was utilized.

[15] In addition, the Niagara Redevelopment Act clearly recognizes this Commission's authority under Part I of the Federal Power Act to regulate licensees such as PASNY, through the imposition and enforcement of conditions in the Niagara Project license.

A related and similarly flawed argument raised by NYSEG's application is that the provisions of NS-11, even if anticompetitive, were imposed by the State of New York and are therefore, immune from the Federal antitrust laws under *Parker* v. *Brown*.[16] An examination of this decision and its development in subsequent cases indicates that the action of the State of New York in this case does not confer antitrust immunity on NYSEG.

In *Parker*, the Supreme Court held that an anticompetitive California raisin marketing program which "derives its authority and its efficacy from the legislative command of the State" was not a violation of the Sherman Act because it was ordered and enforced by a state commission operating under the mandate of a state statute limiting competition among raisin growers. The *Parker* decision was discussed by the Supreme Court in *Cantor* v. *Detroit Edison Co.*[17] In *Cantor*, the Supreme Court considered whether the state public utility commission's approval of a utility's tariff, which contained a provision tying the sale of light bulbs to electric power service, immunized the utility from Sherman Act liability for that tying arrangement. In rejecting the utility's claim of state action exemption, the Supreme Court held that:

> . . . notwithstanding the state participation in the decision, the private party exercised sufficient freedom of choice to enable the court to conclude that he should be held responsible for the consequences of his decision.[18]

In order for a company to be immune from antitrust liability, the state's participation must be so dominant that it would be unfair to hold the private party liable.[19]

---

[16] 317 U.S. 341 (1942).

[17] 428 U.S. 579 (1976).

[18] *Id.* at 59.

[19] Further recognition of the limited circumstanes [sic] in which state action will confer antitrust immunity can be found in two re-

(Footnote continued on next page.)

Here, the provisions of NS-11 were negotiated by PASNY and approved by the State of New York. However, as discussed herein, the territorial restriction was included in NS-11 by NYSEG for its own protection and not as the result of a direction by the state. As in *Cantor,* the state, through the action of PASNY and the Governor, may have approved NS-11 but it did not *impose* the territorial restriction contained in the contract. Clearly, NYSEG exercised "sufficient freedom of choice" in including the restrictive provision in its contracts with PASNY and PASNY's preference customers "to be held responsible for the consequences of its decision."

For the foregoing reasons, NYSEG's application for rehearing will be denied.

The Commission orders:

(1) The petition to intervene of New York State Electric & Gas Company is hereby granted.

(2) The application for rehearing of New York State Electric & Gas Company is hereby denied.

(3) The Secretary shall promptly publish this order in the Federal Register.

By the Commission.

(S E A L)

KENNETH F. PLUMB
Secretary.

(Footnote 19 continued from previous page.)
cent decisions which held that a price squeeze cannot be immunized from antitrust liability because of state approval of the retail rates. City of Mishawaka v. Indiana & Michigan Electric Co., 560 F.2d 1314 (7th Cir. 1977); City of Shakowee [sic] v. Northern States Power Company, Civ. No. 475-491 (D. Minn. October 18, 1976) (unreported decision).

No. 80-1858

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

VILLAGE OF PENN YAN, NEW YORK, and MUNICIPAL ELECTRIC UTILITIES ASSOCIATION OF NEW YORK STATE,

Petitioners,

—v.—

NEW YORK STATE ELECTRIC & GAS CORPORATION, and FEDERAL ENERGY REGULATORY COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT NEW YORK STATE ELECTRIC & GAS CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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—v.—

NEW YORK STATE ELECTRIC & GAS CORPORATION, and FEDERAL ENERGY REGULATORY COMMISSION,

Respondents.

BRIEF FOR RESPONDENT NEW YORK STATE ELECTRIC & GAS CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission can compel involuntary wheeling of electric power by modifying Respondent utility's contract without a hearing under Section 206 of the Federal Power Act where questions related to the public interest were in issue, and without complying with the statutory prerequisites of Sections 211 and 212 of that Act.

The court below held that where, as in this case, a contractual modification declared by the Federal Energy Regulatory Commission (FERC) amounts to an order requiring wheeling,

it must be preceded by a hearing under Section 206 of the Federal Power Act (FPA), 16 U.S.C. § 824e, and by determinations in accordance with the requirements of Sections 211 and 212 of the FPA, 16 U.S.C. § 824j and k. Petition at 34b.[1]

COUNTERSTATEMENT OF THE CASE

The opinion of the court below contains an accurate statement of the factual background of the case, including the proceeding before FERC. Petition at 3b-11b.

Contrary to Petitioners' statements, Petition at 5 and 8, no extensive presentations were made before FERC in this case. The parties before FERC barely completed initial pleadings when that commission, *sua sponte,* issued its declaratory order modifying wheeling contracts of Respondent New York State Electric & Gas Corporation (NYSEG). In fact, NYSEG's petition to intervene before FERC was not even granted until the issuance of the FERC order denying rehearing of its initial order. Petition at 9e.

FERC's summary action denied NYSEG due process by failing to afford it a hearing to substantiate its position that the challenged provisions in its wheeling contracts are in the public interest. The court below agreed with NYSEG that material issues of fact were in dispute and that FERC should have conducted a hearing respecting NYSEG's contracts under Section 206 of the FPA, 16 U.S.C. § 824e(a). Petition at 25b-27b[2].

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1 Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit filed by Village of Penn Yan, New York and Municipal Electric Utilities Association of New York State, Petitioners. The opinion of the Court of Appeals is officially reported at 638 F.2d 388, and it is reprinted in appendix B to the Petition. The term "wheeling" as applied to this case is defined in the opinion below. Petition at 9b, n.4.

2 While Petitioners suggest that the court below ordered a Section 206 hearing only with respect to one of the contracts, Petition at 7-8, a plain reading of the court's opinion shows that a Section 206 hearing must be held respecting both contracts at issue. Petition at 24b-27b; 33b-34b.

The court below also found that FERC's declaratory order modifying NYSEG's contract with the Power Authority of the State of New York (PASNY) in effect compelled wheeling by NYSEG. Petition at 29b. The court rejected FERC's contention that under NYSEG's contract with PASNY, known as Contract NS-11, it was dealing with resale limitations, rather than wheeling. It also rejected FERC's rationalization that instead of compelling wheeling, FERC was merely removing restrictions on the use of wheeled power. Petition at 27b-29b. Petitoners concede that the FERC order in fact compelled wheeling by NYSEG, but urge that Sections 205 and 206 of the FPA, 16 U.S.C. § 824d and e, permit FERC to expand wheeling obligations.

All petitions for rehearing, with suggestions for rehearing *en banc*, having been denied by the court below, this case is ripe for an evidentiary hearing before FERC to examine the public and private interests sought to be protected in this instance.

SUMMARY OF REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

The question presented may become moot in this case. There is no significant question of law presented which justifies the granting of the Petition.[3] The decision below is in full accordance with the decisions of this Court and of the Circuit Courts of Appeal. FERC clearly has no authority to compel wheeling except pursuant to Sections 211 and 212 of the FPA.

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3 FERC itself (through the Acting Solicitor General) in a Memorandum in Opposition has opposed the issuance by this Court of a writ of certiorari.

REASONS FOR DENYING THE PETITION

1. The Question Presented Is Not Ripe for Review by this Court.

The court below determined that the summary disposition of this case by FERC was erroneous, in part because the record revealed to the court material questions relating to the public interest in NYSEG's contracts which should have been considered at a public hearing under Section 206 of the FPA. Petition at 25b-27b. In this case no hearing was held, FERC viewing one as unnecessary because of NYSEG's admission that it preferred not to supply transmission facilities to a competitor.[4] The court properly pointed out that there was no reason for FERC to assume that NYSEG's self-interest is inherently inconsistent with the public interest. Petition at 25b-26b. It correctly concluded that the probable impact of the proposed modification on NYSEG, possible inefficiency in duplicating service and the extent to which NYSEG might be entitled to a contractual "settlement", could not be decided by FERC without a hearing. Petition at 26b-27b.[5]

Thus, under the court's decision a hearing must be held under Section 206. If as a result of that hearing FERC determines that the challenged contractual restriction is in the public interest, then the matter ends there, and the necessity for proceeding further under the provisions of Sections 211 and 212 of the FPA would become moot. Any question concerning the extent of FERC authority to order wheeling

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4 In addition to NYSEG's claim that it was denied due process, FERC also denied PASNY its right to participate in the proceeding if FERC decided to consider the petition before it. Petition at 9b, n.5; 27b.

5 *See generally Mid-Texas Communications Systems, Inc. v. American Tel. & Tel. Co.*, 615 F.2d 1372, 1390 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 286 (1981), where the Fifth Circuit held that concern with duplication of telephone service and facilities resulting in inefficient service presents a possible ground for a legitimate refusal to interconnect telephone systems in the public interest, which required a hearing to determine the reasonableness of AT&T's refusal to interconnect with Mid-Texas.

subsequent to the enactment of Sections 211 and 212 is, therefore, premature.

2. The Question Presented Lacks Sufficient Significance for Review by this Court.

Petitioners grossly exaggerate the impact of the decision below on FERC's ability to regulate electric utilities properly under Sections 205 and 206 of the FPA. They also mischaracterize the facts of this case and the relevant holding below in an obvious effort to bolster their overstatement of the significance of this case involving electric service to about 30 residential customers. Petition at 4.

Contrary to Petitioners' assertions, the court below specifically affirmed FERC's authority to modify nearly all terms and conditions of wheeling contracts pursuant to the authority granted it under Section 206 of the FPA. The decision states as follows:

> Nor do we suggest that the Commission is powerless to review a wheeling agreement under § 206 without following the requirements of §§ 211 and 212. *If, after a hearing as required by § 206, the Commission determines that a particular rate, charge, or condition is unreasonable, it can order a modification.* But where, as here, the modification amounts to an order requiring wheeling, it must be preceded also by determinations in accordance with §§ 211 and 212. Petition at 34b (emphasis added).

As the court pointed out, FERC can ordinarily nullify a particular wheeling rate, charge or condition if it determines it unreasonable after a hearing under Section 206. On the other hand, the decision preserves the traditional voluntariness of wheeling arrangements by properly interpreting FERC's limited authority to compel wheeling pursuant to Sections 211 and 212. Petitioners' argument concerning the alleged impact of this case on FERC authority under Sections 205 and 206 is insupportable.

Prior to the enactment of Sections 211 and 212, FERC had no authority whatsoever to compel wheeling. *Otter Tail Power Co. v. United States,* 410 U.S. 366, 375-76 (1973). The decision below simply reflects the state of the law relative to wheeling subsequent to the decision of this Court in *Otter Tail, supra.* The Second Circuit's narrow holding respecting wheeling does not deprive FERC of any authority granted it under the FPA.

The lack of significance of this case is underscored by the fact that not one comparable case has been cited by Petitioners. Nor are we aware of any court decision which conflicts with the ruling of the court below. Petitioners' parochial interests aside, the significance of the Second Circuit's decision lies in its affirmation of FERC's jurisdiction to modify the wheeling contract to which PASNY is a party, and FERC's responsibility to consider antitrust policy in appropriate circumstances. Petition at 12b; 23b. Furthermore, FERC's authority to modify other forms of transmission contracts without complying with Sections 211 and 212 is not in question. This case simply involves the enlargement of a wheeling obligation (which obligations have traditionally been left to voluntary arrangements) without affording the parties a hearing under Section 206 of the FPA under the circumstances and without complying with Sections 211 and 212. Petitioners' claims concerning the impact of the decision do not warrant the granting of their Petition.

The ultimate relief sought by Petitioners would seriously undermine Congressional intent as well as this Court's holding in *Otter Tail, supra* relative to FERC authority over wheeling. If permitted to stand, the FERC order modifying NYSEG's contracts would have effected an unprecedented and unwarranted enlargement of a voluntary, limited wheeling obligation in direct conflict with settled case law and the intent of Congress. This Court should not grant the Petition because the question presented does not warrant further consideration.

3. The Decision Below Is in Full Accordance with Judicial Precedent and the Intent of Congress.

As discussed *supra* at 5-6, the decision below preserves FERC's full regulatory authority over transmission contracts under the FPA and affirms FERC's responsibility to consider antitrust policy in appropriate circumstances. As for wheeling, the Court of Appeals properly determined the extent of FERC's authority to modify such voluntary contracts. Its decision is in accordance with this Court's determination in *Otter Tail Power Co. v. United States*, 410 U.S. 366, 375-76 (1973), and it is consistent with the decisions in *Central Iowa Power Cooperative v. FERC*, 606 F.2d 1156, 1169 (D.C. Cir. 1979), *Sunflower Electric Cooperative, Inc. v. Kansas Power and Light Co.*, 603 F.2d 791, 798-800 (10th Cir. 1979), and *Richmond Power & Light v. FERC*, 574 F.2d 610, 619-20 (D.C. Cir. 1978), the only other Circuit Court of Appeals decisions found which considered the question of FERC's authority to compel wheeling.

There is no substance whatsoever to the suggestion by Petitioners that FERC has previously compelled wheeling by modifying voluntary and limited contractual wheeling terms. It should also be noted that FERC never found the challenged provisions in NYSEG's contracts to be discriminatory, and, therefore, FERC's power to correct discriminatory provisions in contracts was not in issue below. The gravamen of the complaint about NYSEG's contracts was that they were anti-competitive in effect *per se*. *See* Petition at 1d; 1e. The Second Circuit properly rejected FERC's summary conclusion on the issue presented.

Petitioners claim that the decision in *Otter Tail, supra* supports their position. Petition at 16. Their misplaced reliance on that case is surprising. In *Otter Tail, supra*, this Court extensively reviewed the legislative history of the FPA relative to wheeling and flatly concluded:

> So far as wheeling is concerned, there is no authority granted the Commission [FERC] under Part II of the

> Federal Power Act to order it, for the bills originally introduced contained common carrier provisions which were deleted. The Act as passed contained only the interconnection provision set forth in § 202(b). The common carrier provision in the original bill and the power to direct wheeling were left to the "voluntary coordination of electric facilities." 410 U.S. at 375-76 (footnotes omitted).

The Petition utterly fails to address such conclusion of this Court. Instead it advocates an unfounded claim concerning wheeling based upon the effect of a judicial decree under the antitrust laws and upon a footnote taken out of context from the dissenting portion of the "separate opinion" in that case, referred to in the Petition at 16, n.8. Neither the decree nor Petitioners' convenient deployment of the footnote provide any basis upon which to ignore the relevant holding in *Otter Tail, supra*. Besides, Petitioners' references suggest no more than the fact that FERC has jurisdiction to regulate voluntary wheeling agreements to the extent to which the utility has volunteered to wheel or to which a court has ordered the utility to wheel. There is nothing in this which is inconsistent with the decision below.

Petitioners' argument rests solely upon the transparent allegation that somehow FERC had authority to compel wheeling prior to enactment of Sections 211 and 212 of the FPA. Their repetitive assertion that the decision "emasculates" pre-existing FERC authority to compel wheeling simply begs the question repetitively. Petitioners cite neither case law nor legislative history demonstrating that FERC may compel enlargement of a wheeling obligation without compliance with Sections 211 and 212. Their argument flies in the face of *Otter Tail, supra* and Congressional intent.

Petitioners contend at page 16 of their Petition that the decision in *Richmond Power & Light Co. v. FERC*, 574 F.2d 610 (D.C. Cir. 1978), supports their argument; however, the court there rejected an argument similar to the one pressed

here by Petitioners. That court refused to permit the indirect ordering of wheeling by FERC in view of the Congressional call for voluntary arrangements in this area. *Richmond, supra* at 620. Petitioners' reliance on *dicta* from *Richmond, supra* is uncompelling. That court stated, with reference to allegations of discrimination, as follows:

> [T]he Commission correctly ruled that since Congress made wheeling voluntary an individual decision to wheel for one customer but not for another is not automatically discriminatory. This rejection of a per se rule follows logically from the congressional refusal to impose common-carrier duties on electric utilities. 574 F.2d at 623 (footnotes omitted).

See also Sunflower Electric Cooperative, Inc. v. Kansas Power and Light Co., 603 F.2d 791, 799-800 (10th Cir. 1979). Moreover, as noted previously, FERC made no finding in this case that NYSEG's wheeling contracts are discriminatory. *See* Petition at 1d; 1e. Thus, there is no conflict between the decision in *Richmond, supra* and the decision below.

Petitioners' reference to an unpersuasive excerpt of the views of a FERC witness, who was testifying before a Congressional committee relative to draft legislation, is hardly indicative of Congressional intent. Petition at 10. Similarly, their excerpt of remarks by Senator Metzenbaum does not support the Petition. His quoted statement, Petition at 10, was taken out of context, and it was not directed solely to the subject of FERC authority over wheeling. Petitioners have conveniently omitted the following paragraph from the Senator's statement, which immediately follows and clarifies the meaning of the excerpt quoted by Petitioners:

> Thus, a party which has been denied wheeling services for anticompetitive reasons will not be hindered by this legislation from proceeding in the Federal courts or elsewhere. Likewise, the authority of the [Nuclear Regulatory Commission] in conducting an antitrust review under the provisions of the Atomic Energy Act of 1954, as

> amended, would not be affected by this extremely limited wheeling authority granted to FERC under this new legislation. These two agencies are charged with different responsibilities with respect to wheeling. [FERC's] new authority is condition[ed] on conservation, efficiency, reliability, and public interest. NRC's authority relates to correcting or preventing a situation inconsistent with the antitrust laws. 124 Cong. Rec. 17802 (daily ed. Oct. 9, 1978).

The Senator gave no indication that FERC had any "pre-existing" authority to compel wheeling. In fact, his reference to Sections 211 and 212 as "new" and "extremely limited wheeling authority granted to FERC" confirms that, prior to enactment of those provisions, FERC had no authority to compel a utility to wheel. We submit that had Congress intended Petitioners' viewpoint, it would have been incumbant upon it to speak to the question and overturn this Court's holding in *Otter Tail, supra.* Instead, however, Congress enacted Sections 211 and 212.

The court below correctly construed the relevant intent of Congress when it enacted Sections 211 and 212 of the FPA. *See* Petition at 29b-33b. While FERC could seek, after a hearing, to enjoin performance of a wheeling contract which did not comport with its view of the public interest and statutory requirements under Sections 205 and 206, *see* FPA Section 314, 16 U.S.C. § 825m, to compel wheeling by modifying a voluntary contractual commitment is qualitatively a different power and one denied FERC until the enactment of Sections 211 and 212 of the FPA. The court below understood the line drawn by Congress and this Court, and its decision reflects that.

All of the other authorities relied upon by Petitioners are inapposite and readily distinguishable. For instance, in *Central Iowa Power Cooperative v. FERC,* 606 F.2d 1156 (D.C. Cir. 1979), cited at page 17 of the Petition, FERC refused to modify a challenged power pooling agreement relative to the subject of wheeling, and the Court of Appeals for the District

of Columbia Circuit, relying on its prior decision in *Richmond, supra,* upheld FERC's position that FERC had no authority to compel wheeling. *Id.* at 1169. The primary issue in *Central Iowa, supra* dealt with membership provisions in the proposed agreement which were determined to be unreasonable after a Section 206 hearing. In addition, the opinion in *Central Iowa* clearly reflects that court's understanding that FERC had only limited powers to affect a voluntary power pooling agreement. *Id.* at 1168. Finally, it appears that FERC did not compel the filing and implementation of a modified power pooling agreement in *Central Iowa,* as FERC attempted to do respecting NYSEG's wheeling contracts. The decision in *Central Iowa* simply does not support Petitioners' argument. On the contrary, it is totally consistent with the decision below.

Similarly, the decision in *Municipalities of Groton v. FERC,* 587 F.2d 1296 (D.C. Cir. 1978), also cited at page 17 of the Petition, is irrelevant to the question presented. In *Groton, supra,* the court held that FERC had jurisdiction over a certain type of transmission rate known as a "deficiency charge" and that FERC could modify that charge in the public interest. *Groton, supra* at 1301-03. The decision in *Groton, supra* has nothing to do with FERC authority to compel wheeling. Furthermore, as previously noted, the decision below affirms FERC jurisdiction to modify rates and charges for wheeling service. Petition at 34b. It is thus in full accord with the decision in *Groton, supra.*

Petitioners' extensive reliance on a series of railroad cases to support its Petition is completely unavailing. All of these cases are based upon the fundamental principle that railroads are by statute common carriers. *See Richmond, supra,* 574 F.2d at 623, n.59. By contrast, as this Court has observed, Congress specifically deleted common carrier provisions when it passed the FPA. *Otter Tail, supra,* 410 U.S. at 375-76. While many of the provisions of the FPA may have been based upon the Interstate Commerce Act, 49 U.S.C. § 1 *et seq.,* as alleged in the Petition, Congress has determined that electric utilities are to be left to voluntary commitments in such areas as wheeling

except when Sections 211 and 212 are invoked. Unlike railroads, electric utilities are not common carriers, and they may limit their obligations to wheel, subject now to modification and compulsion by FERC under Sections 211 and 212 of the FPA.

This Court recently declined to permit the Federal Communications Commission to extend its jurisdiction to issue regulations which, in effect, would have made certain communications entities "common carriers" in direct conflict with Congressional intent that they remain free of governmental compulsion in certain areas. *See FCC v. Midwest Video Corp.*, 440 U.S. 689, 700-09 (1979). In the face of a similar expression of Congressional intent, that electric utilities are not to be treated as common carriers respecting wheeling, this Court should decline to review the decision below. The Court of Appeals for the Second Circuit properly found that a hearing under Section 206 of the FPA should have been held in this instance, and it correctly interpreted FERC's new and extremely limited authority to compel wheeling under the FPA.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

August 1981

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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VILLAGE OF PENN YAN, NEW YORK, ET AL., PETITIONERS

v.

NEW YORK STATE ELECTRIC & GAS CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

Petitioners seek review of the court of appeals' determination that the Federal Energy Regulatory Commission must conduct a hearing under Sections 211 and 212 of the Federal Power Act, 16 U.S.C. (Supp. III) 824j and 824k,[1] before the Commission may enlarge the scope of a utility's preexisting voluntary commitment to "wheel"[2] electric power.

1. Petitioner, the Village of Penn Yan, is a New York municipality that owns and operates a municipal electric system. To provide retail electric service to its customers, Penn Yan purchases hydroelectric power from the Niagara

[1]These statutes are set forth at Pet. App. 2a-8a.

[2]"Wheeling" is a transfer of electric power by direct transmission or displacement from one utility to another over the facilities of an intermediate utility. See *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 368 (1973).

Project operated by the Power Authority of the State of New York ("PASNY"). PASNY power is "wheeled" to Penn Yan through the interstate transmission facilities of an investor-owned utility, New York State Electric & Gas Corporation ("NYSEG"). NYSEG's obligation to wheel PASNY power for Penn Yan is contained in two contracts. These contracts are subject to the jurisdiction of the Commission under Sections 205 and 206 of the Federal Power Act, 16 U.S.C. (& Supp. III) 824d and 824e. Both contracts contain provisions that limit Penn Yan's use of power wheeled by NYSEG to retail service within the Village boundaries as they existed on February 10, 1961 (Pet. App. 5b-7b).

In 1967, Penn Yan annexed territory outside its 1961 municipal borders. In an effort to provide electric service to residents in the annexed territory, Penn Yan filed with the Commission a petition for a declaratory order, requesting that the Commission invalidate the contractual provisions which restrict the Village's use of the PASNY power, wheeled by NYSEG, to the Village's preexisting boundaries (Pet. App. 7b-8b).

On the basis of the pleadings, the Commission issued a declaratory order (Pet. App. 1d-10d) that the wheeling provisions were unenforceable, finding that they were anti-competitive and served no countervailing public interest objective, and that they were unjust and unreasonable terms and conditions of an agreement subject to the Commission's jurisdiction. The Commission further determined that its ruling did not result in an order compelling wheeling; rather, in the Commission's view, by rendering the restrictive provisions unenforceable, the Commission simply removed a restriction on the use of power that NYSEG had already agreed to wheel (*id.* at 9d). As it pointed out, "[b]y eliminating the restrictive provisions, we are eliminating the restrictions on the use of the wheeled

power rather than 'compelling wheeling' " (*ibid.*). The Commission affirmed its ruling on application for rehearing (Pet. App. 1e-9e).

The court of appeals affirmed in part and vacated and remanded in part (Pet. App. 1b-37b). The court rejected the Commission's determination that the undisputed facts contained in the pleadings provided a sufficient record to justify modification of the contracts (*id.* at 25b-27b). While recognizing that NYSEG's pleadings demonstrated that one purpose of including the restrictive provisions was to protect itself from competition, the court noted that NYSEG's petition also alleged that the challenged contractual restraints were in the public interest. The court held that a determination with regard to the public interest allegation should not have been made without an evidentiary hearing under Section 206 of the Act to determine, *inter alia*, "the probable impact of the proposed modification on NYSEG, the possible inefficiency in duplicating service, [and] the extent, if any, to which NYSEG might be entitled to a 'settlement' " as a result of the proposed modification (*id.* at 26b-27b).

A majority of the panel also concluded (Pet. App. 27b-34b) that the Commission's modification of the contracts amounted to an order requiring wheeling and should have been preceded by findings and a hearing under Sections 211 and 212 of the Federal Power Act, 16 U.S.C. (Supp. III) 824j and 824k. The court ruled that, while the statutory provisions do not, on their face, resolve the issue, the purpose and history of Sections 211 and 212 demonstrate that those sections were intended to apply to Commission orders that would expand a voluntary commitment to wheel (Pet. App. 29b). In the majority's view, to permit the Commission to modify the contracts in a manner that expanded NYSEG's voluntary agreement to wheel, without requiring

the Commission to conduct a hearing and make certain findings as provided in Sections 211 and 212, would be inconsistent with the intent of Congress (Pet. App. 33b).

District Judge Goettel dissented from this portion of the court's opinion (Pet. App. 34b-37b). In his view, the Commission's action, which requires NYSEG to wheel power for an additional 27 customers in Excell Estates, has "a *de minimis* effect on the amount of power wheeled to Penn Yan" (*id.* at 36b). Under these circumstances, Judge Goettel would not require the Commission to comply with Sections 211 and 212 before modifying the wheeling agreement. However, because PASNY had requested a hearing under Section 206 of the Act, and because the Commission's action affects NYSEG's obligation to wheel to other municipalities named in the PASNY/NYSEG contract, Judge Goettel would have remanded the case for a hearing under Section 206 (Pet. App. 36b-37b).

2. To be sure, the question whether the Commission is empowered to enlarge upon a preexisting wheeling obligation without following the procedures added to the Federal Power Act by the Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3136-3140, is an issue of some importance to the regulation of electric power transmission. We submit, however, that this case is not an appropriate vehicle to decide that question.

To begin with, the case is in an interlocutory posture, a factor that ordinarily militates against review on certiorari. See R. Stern & E. Gressman, *Supreme Court Practice* 300-301 (5th ed. 1978). Before deciding that the procedures provided for in Sections 211 and 212 of the Federal Power Act were applicable here, the court of appeals held that the Commission should have held a hearing under Section 206 of the Act to determine whether the challenged contractual restraints were in the public interest (Pet. App. 25b-27b). Thus, regardless of whether the court below was correct

in its interpretation of Sections 211 and 212 of the Act, the case must be remanded to the Commission in any event for further proceedings under Section 206. If, following that hearing, the Commission concludes that the "contractual restraints were in the public interest," as asserted by NYSEG (Pet. App. 25b), it would have no occasion to reach the Sections 211 and 212 wheeling controversy.

Moreover, no other circuit has yet dealt with the nature of the Commission's obligations under the new statutory provisions.[3] Furthermore, the instant controversy involves the transmission of electric power for fewer than 30 homeowners, a factor which led one of the three judges below to view the Commission's order as having a *de minimis* effect (Pet. App. 36b). In light of these factors, we believe that the Court should await further developments before deciding to review the issue presented here.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[3]Cases such as *Central Iowa Power Cooperative* v. *FERC*, 606 F. 2d 1156 (D.C. Cir. 1979), and *Richmond Power & Light* v. *FERC*, 574 F. 2d 610 (D.C. Cir. 1978), were decided without reference to the 1978 amendments to the Act. The issue has been raised in a case that is currently pending before the Fifth Circuit, *Florida Power & Light Co.* v. *FERC*, No. 80-5259.

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